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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 442

ELIZABETH GURLEY FLYNN, PETTIS PERRY, CLAUDIA JONES, ALEXANDER BITTELMAN, ALEXANDER TRACHTENBERG, VICTOR JEREMY JEROME, ALBERT FRANCIS LANNON, LOUIS WEINSTOCK, ARNOLD SAMUEL JOHNSON, BETTY GANNETT, JACOB MINDEL, WILLIAM WOLF WEINSTONE AND GEORGE BLAKE CHARNEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported but is printed in petitioners' appendix record (A. App. 186). The trial judge's opinion overruling petitioners' pretrial motions is reported at 103 F. Supp. 925. His opinion overruling the challenge to the jury is re-

ported at 106 F. Supp. 966 and is printed in petitioners' appendix record (A. App. 27).[1]

JURISDICTION

The judgment of the Court of Appeals was entered on October 14, 1954 (A. App. 261). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial judge properly instructed the jury as to the evidence they could consider in determining whether petitioners intended to cause the violent overthrow of the Government.

2. Whether petitioners were entitled to a hearing on the issue of "clear and present danger."

3. Whether the requirement of "clear and present danger", as defined in *Dennis* v. *United States,* 341 U. S. 494, was satisfied in this case.

4. Whether the evidence was sufficient to sustain the verdict of the jury.

5. Whether Lautner's testimony as to the circumstances of his expulsion from the Communist Party was admissible evidence.

6. Whether the concurrent findings of the courts below with reference to the challenge to the jury system are clearly erroneous.

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[1] The record filed by petitioners includes the appendix to their brief as appellants in the Court of Appeals and is here referred to as "A. App." The reporter's typewritten transcript of the trial is referred to as "Tr."

7. Whether there existed such inflamed public opinion throughout the United States that the trial of petitioners should have been postponed indefinitely.

8. Whether a mistrial should have been declared because of the conduct of certain jurors.

STATUTES INVOLVED

The statutes involved are set forth in the petition, pp. 3–8.

STATEMENT

THE PROCEEDINGS BELOW

On June 20, 1951, petitioners were indicted (A. App. 4–11) in the United States District Court for the Southern District of New York for conspiring with each other and with the *Dennis*[1] conspirators "to commit offenses against the United States prohibited by Section 2 of the Smith Act * * * in violation of" Section 3 of the Smith Act until repealed by the 1948 revision and thereafter in violation of the general conspiracy statute, 18 U. S. C. 371, by (1) wilfully and knowingly advocating and teaching the violent overthrow and destruction of the Government; and (2) wilfully and knowingly organizing the Communist Party to so advocate.

As a part of the conspiracy, the indictment alleged in paragraphs 2–8 the following: (2) that petitioners and co-conspirators would par-

[1] *Dennis* v. *United States*, 341 U. S. 494.

ticipate in the organization of the Communist Party of the United States of America as a group of persons who engage in the proscribed advocacy; (3) that they would become members, officers and functionaries of the Communist Party; that they would assume leadership of the Party and responsibility for carrying out its policies and activities; (4) that they would cause clubs and other units of the Party to be organized, and would recruit and encourage recruitment of members of the Party, concentrating on recruiting persons in key industries and plants; (5) that they would conduct and cause to be conducted schools and classes for indoctrination in the principles of Marxism-Leninism in which would be taught the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; (6) that they would publish and circulate and cause to be published and circulated books, articles, magazines and newspapers in which was taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; (7) that they would write, and cause to be written, articles and directives in publications of the Communist Party including "Political Affairs," "Morning Freiheit," "Daily Worker," and "The Worker," in which was taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and

violence; (8) that they would agree upon and carry into effect detailed plans for the vital parts of the Communist Party to go underground, in the event of emergency, and from the underground position to continue the conspiracy charged.

The indictment then alleged overt acts in furtherance of the conspiracy.

The trial judge held that the indictment charged but a single conspiracy with two objects, and ruled out, as beyond the statute of limitations, consideration by the jury of the second object, that of organizing the Communist Party for the proscribed advocacy (A. App. 135–136). However, the evidence on the organizing aspect was considered in respect to the first object, that is, as to the conspiracy to engage in the proscribed advocacy and teaching (A. App. 150–153).

At the time of the trial, four defendants (William Norman Marron, Fred Fine, Sidney Stein, and James E. Jackson), were fugitives and had not been arrested.[3] Two defendants (Israel Amter and Marion Bachrach) were severed because of illness, and two (Isidore Begun and Simon Gerson) were acquitted by the trial judge at the end of the prosecution's case. The thirteen remain-

[3] Sidney Stein was apprehended on August 27, 1953, in the Sierra Mountains of California, together with Robert G. Thompson, another fugitive who was one of the defendants convicted in the *Dennis* case. *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied October 14, 1954.

ing defendants were convicted and are the petitioners here.

After disposition of the pretrial motions, the case was called for trial on March 3, 1952. At that time, petitioners filed a challenge to the array of the petit jury panel. Commencing on March 31, 1952, hearings were held on this challenge and, after some three weeks, the trial judge overruled the challenge (A. App. 26). The jury selection was started on April 1, 1952 and was completed on April 23, 1952. On January 15, 1953, the case was submitted to the jury, which deliberated for 6 days. The verdict of guilty was returned on January 21, 1953, and sentence was imposed 13 days later. Petitioners' sentences ranged from imprisonment for a year and a day and $2,000 fine to three years and $6,000 fine (A. App. 173–185).

The judgments were affirmed by the Court of Appeals on October 14, 1954 (A. App. 186–250).

THE GOVERNMENT'S EVIDENCE

The evidence in support of the verdict of the jury demonstrated that the defendants in the *Dennis* case were co-conspirators of petitioners, that in fact these petitioners were members of the same conspiracy proved in that case. To demonstrate that these petitioners were sitting at the same table as the *Dennis* defendants, a summary of important Communist Party positions held by petitioners is set forth:

ELIZABETH GURLEY FLYNN—Member of National Committee, 1938 (Tr. 4503, 12069–71); Vice President, Communist Political Assn., 1944 (Ex. 12B); Member of National Board and National Committee of Reconstituted Party, 1945, 1948 (Tr. 3855, 4503, 6674); Chairman, National Women's Commission (Tr. 4503).

PETTIS PERRY—Member, National Committee, Communist Political Assn., 1944 (Ex. 12B); Secretary of National Negro Commission, 1948 (Tr. 4507–8); Alternate National Committee Member, 1950 (Tr. 6674).

CLAUDIA JONES—Member of National Committee, 1945 (Tr. 3855, 4504); Secretary of National Women's Commission (Tr. 4504); Alternate National Committee Member, 1950 (Tr. 6674).

ALEXANDER BITTELMAN—Representative of Politburo (National Board) 1936–7 (Tr. 1917–24); Member of National Committee, 1945 (Tr. 3855); Editor, Political Affairs (Tr. 4494); Head, Party's Jewish Bureau, 1945 (Tr. 4501); Member of Nationality Groups Commission, 1945 (Tr. 4501).

ALEXANDER TRACHTENBERG—Alternate National Committee Member, Communist Political Assn., 1944 (Ex. 12B); head International Publishers since 1935 (Tr. 1966); Chairman, National Review Commission (Tr. 4508); Director, Jefferson School (Tr. 4508); Member of Central (National) Committee, 1930's (Tr. 4508).

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VICTOR JEREMY JEROME—Editor, The Communist (Tr. 2001, 4504); Editor, Political Affairs (Tr. 4504); Chairman, National Cultural Commission (Tr. 4504); Member, National Educational Commission (Tr. 4266).

ALBERT FRANCIS LANNON—District Organizer, Baltimore-Washington, D. C. 1943 (Tr. 2415, 4506); Alternate National Committee Member, Communist Political Assn., 1944 (Ex. 12B); Member, National Committee, 1945 (Tr. 3877, 4506–7); National Maritime Coordinator, 1948 (Tr. 4542); Member, National Labor Commission, 1945 (Tr. 4542).

LOUIS WEINSTOCK—Member, National Committee, Communist Political Assn., 1944 (Ex. 12B); Member, National Committee, 1945 (Tr. 4509–10); Member, National Review Commission, 1948 (Tr. 4060, 4509–10).

ARNOLD SAMUEL JOHNSON—Organizational Secretary, Ohio 1940's (Tr. 2269–72); Member, National Committee Communist Political Assn., 1944 (Ex. 12B); Member, National Committee, 1945 (Tr. 4504); Chairman, National Nationality Groups Commission, 1949 (Tr. 4504).

BETTY GANNETT—Member, National Organization Education Committee, 1944 (Tr. 2040, 2045); Assistant National Organizational Secretary, 1945 (Tr. 4503); Member, National Education Commission, 1945 (Tr. 4503, 4266); Member,

National Youth Committee, 1945 (Tr. 4503).

JACOB MINDEL—Head, National Training School Commission, 1941 (Tr. 3582–4, 4507); Member, National Organization—Education Committee, 1944 (Tr. 2045); Member, National Cadre and Review Commission, 1945 (Tr. 3856); Member, National Review Commission, 1945 (Tr. 4507).

WILLIAM WOLF WEINSTONE—District Organizer, New York—1930's–1940's (Tr. 4510); District Organizer, Michigan—1930's–1940's (Tr. 4510); Member, National Committee—1930's–1940's (Tr. 4510); Chairman, New York State Educational Committee (Tr. 4510); Member, New York State Committee (Tr. 4510); Worker for National Education Commission, 1948 (Tr. 4510).

GEORGE BLAKE CHARNEY—Organization Secretary, Section 10, New York City 1930's (Tr. 4502); District Organizational Secretary New England 1930's (Tr. 4502); Chairman, Queens County 1940 (Tr. 2411–12); Chairman, New York County (Tr. 4502); Member, New York State Committee and Board (Tr. 4502); Member, New York State Secretariat, 1949 (Tr. 4502).

A partial summary of the Government's evidence is as follows: At the trial, the Government introduced evidence showing petitioners' activities, functioning through the apparatus of the Communist Party as it was reconstituted in

1945, advocating the overthrow and destruction of this Government by force and violence, such advocacy being for the purpose of violently overthrowing the Government as speedily as circumstances would permit.

The proof consisted of testimony of former members of the Communist Party and the introduction of books, articles, etc., which set forth the policies and program of the Party, and paralleled the proof in the *Dennis* case. As in *Dennis*, this evidence showed that in 1944, when the United States and the Soviet Union were military allies, the Party, under the leadership of Earl Browder, was reorganized as the Communist Political Association and engaged in a policy of peaceful collaboration of the classes; that in 1945, following the direction given the Party in the United States by an article published in France by the French Communist leader Jacques Duclos (Ex. 13, Tr. 2053–2079), the Communist Party was reconstituted and a system of schools and classes established for the propagation of the Marxist-Leninist principles of the overthrow and destruction of the Government by force and violence.

In June 1945, the National Committee of the Communist Political Association voted to call a national convention of the Party (Tr. 2092). Present at this important meeting were petitioners Lannon, Bittelman, Trachtenberg, Jerome, Mindel, Weinstock, Gannett, and Flynn

(Tr. 2086, 12,367–70). In the latter part of July 1945, the emergency National Convention of the Communist Political Association was held in New York City (Tr. 3851) to undo what had been accomplished in the previous convention in May, 1944. Co-conspirator Potash presided as the permanent chairman (Tr. 3858). The following petitioners attended: Gannett, Flynn, Weinstock, Johnson, Jerome, Trachtenberg, Lannon, Bittelman and Jones (Tr. 2163, 3853–4). Far from being like the conventions of a normal political party, the 1945 Party convention and later Party conventions were conducted under strict security measures. No one was admitted without being carefully screened (Tr. 3392, 4366–9, 4379–80, 4395). The press was excluded (Tr. 4380, 12420–2). At the 1948 National and New York State conventions, even the names of delegates did not appear on their passes (Tr. 4379), and not all reports to the convention were released publicly (Tr. 3081).

The delegates to the 1945 convention unanimously voted to reconstitute the Communist Party and chose William Z. Foster as its head (Ex. 17). Petitioners Flynn and Weinstock were selected as members of the Party's dominating National Board, together with co-conspirators Foster, Dennis, Williamson, Thompson, Davis, Stachel, and Potash. On the National Committee, in addition to the National Board members, were petitioners Johnson, Bittelman, Jones and Lannon, and co-conspirators Green,

Winter, Hall, Gates, Winston and Amter (named as a defendant but not tried due to illness). On the nineteen-member Cadre and Review Commission, in charge of training personnel, were petitioners Mindel and Trachtenberg (Ex. 17, Tr. 3855–6).

The evidence showed, as in *Dennis*, that absolute compliance with the Party line was insured by enforcement of the principle of democratic centralism, established at the 1945 reconstituting convention and followed at later Party conventions, a principle which was adopted from the Communist Party of the Soviet Union. The meaning of "democratic centralism" in plain language is that decisions emanating from the national organization of the Communist Party are binding on all Party members. Once a decision of the National Committee is handed down, all the subordinate bodies of the Party, down to the lowest level, must obey this decision. In this manner, with the broad powers conferred on the national leadership by the Party constitution, and within the rigid disciplinary framework imposed by the principle of democratic centralism, the national organization of the Communist Party maintains direct control of all the Party members and functionaries (Exs. 3F, 9R, 18, 66; Tr. 3403–4).

The convention adopted a constitution which dedicated the Party "to the principles of scien-

tific socialism, Marxism-Leninism" (Ex. 18, Tr. 2178).

The 1945 constitution of the Communist Party was carefully prepared, with a Party attorney on the Constitution Committee (Tr. 3857). Much of it was couched in legal protective language—"the Aesopian language of V. I. Lenin, in order to be able to defend the party legally in the courts while pursuing the practices of Marxism-Leninism" (Tr. 2229).[4]

The fact that the provisions of the Party constitution were not accepted and applied at their face value was emphasized over and over again through the testimony of many witnesses. For example, despite the Party constitution's specific provisions for a hearing, including the calling of witnesses, prior to the expulsion of any member (Ex. 18, Articles IX and X; Ex. 66, Art. VIII), the evidence is clear that these provisions were frequently honored in the breach. See testimony as to expulsion of Lautner (Tr. 4579–94), Matu-

[4] The phrase "Aesopian Language" was used among other places by Lenin in his work "Imperialism" (Ex. 20A). The publisher of the pamphlet "Imperialism", International Publishers, which was headed by Trachtenberg, explained Lenin's reference as follows:

> "'Aesopian,' after the Greek fable writer Aesop, was the term applied to the allusive and roundabout style adopted in 'legal' publications by revolutionaries in order to evade the censorship."

Another example of the use of this technique by Lenin may be found in Exhibit 39A, where he substituted the words "decisive struggle" for the words "armed uprising."

sow (Tr. 6683–4), and Markward (Tr. 8187–8). Lautner, who was Chairman of the New York State Review Commission and a member of the Party's highest disciplinary body, testified that hearings were sometimes held without witnesses, and even where witnesses were permitted the results sometimes were predetermined (Ex. MM, Tr. 6295–6). Also, testimony concerning the Goldenberg incident reveals that although certain members of the Communist Party openly advocated force and violence, contrary to the Party constitution (Exs. 18, 66), they were not expelled, nor was any disciplinary action taken against them (Tr. 4010–56). Goldenberg too was not permitted to call witnesses (Tr. 4051). The testimony of petitioner Flynn is replete with examples of how often the Party constitution was violated even in such important matters as the election of members to the National Committee (Tr. 12069–71), election to the Political Committee (Tr. 12099–103), and the failure to hold constitutionally required National Committee meetings (Tr. 12192, 12197–8).

That the petitioners in this case understood the nature and significance of the reconstitution of the Communist Party in 1945 was made clear through the direct expressions of many of them. Petitioner Jerome in the fall of 1945 criticized Browder's revisionism because—

> "* * * Browder had erroneously interpreted the phrase 'our theory is not a dogma'—to make it out that Marxism-Leninism could be turned into something other than Marxism-Leninism, that he, Jerome, intended to show that Marxism-Leninism as a theory was a principle and that an essential part of that principle was the necessity for the revolutionary overthrow of the bourgeois governments, including that of the United States just as there had been the Bolshevik revolution in Soviet Russia" (Tr. 2378–9).

A similar statement was made by Trachtenberg (Tr. 2333), and the return of the Party to the Marxist-Leninist line was regarded as a "vindication" of petitioner Mindel's teaching and training of cadres through the years of the Communist movement (Tr. 2417). Petitioner Lannon, at a Communist Party meeting during the latter part of 1945, said that in the event of war with the Soviet Union, the policy of the Communist Party in this country must be one of sabotage not only in war industries but in all industries, so that the United States Government would be unable to support a war and the public would be unwilling to do so (Tr. 7610–11). Shortly before Christmas, 1945, Lannon stated that at a time of depression the revolutionary situation would be ripe, and that the help of the Red Army was necessary

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in order to accomplish the revolution, and he described the preparations being made by the Soviet army and air force from which an attack against the United States could be launched (Tr. 7612–13).

When the Party was reconstituted in 1945, the Party reemphasized its program of concentration upon recruiting persons employed in basic industries and plants in accordance with the Party's pre-1945 teaching.[5] At the 1945 convention, Williamson, the Organizational Secretary (Tr. 3859), called for a policy of concentration on basic industrial workers in "industrial towns such as McKeesport, Schenectady, Youngstown, Akron, Flint, Gary and towns in the Anthracite and West Virginia" (Ex. 22E, p. 815). See also National Board Resolution, June 2, 1945 (Ex. 14).

In 1946, at a meeting of the National Committee, co-conspirator Williamson called for greater efforts from the leading comrades in the maritime, auto, steel, electric, radio and leather industries (Ex. 62C). He pointed out that "in all concentration industries, we must work to establish strong Party organization in the key plants and then extend our influence from them to the areas which surround them" (Ex. 62B). In October, 1947, Williamson again urged that the Communist

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[5] "* * * Party organizers should be always conscious to bring forward, develop—and cultivate and develop basic industrial workers in the Party into professional revolutionaries" (Tr. 3719).

Party leaders "pay particular heed to the workers in basic industry, coal, steel, power, and so forth, because control of them is essential to proletarian revolution" (Tr. 7761).

In December, 1948, it was co-conspirator Winston who restated the policy of building the Party in the steel industry, shipyards, coal mines and manufacturing plants. He instructed the Party youth to "get out of New York and to get out into the Midwest into basic industries" in order to get "a nucleus of workers on the side of the Communist Party * * * so that in the event of any imperialistic war * * * we could help the side of the Soviet Union" (Tr. 6625–6626).

Petitioner Gannett, at a meeting of the National Committee in September, 1949, reminded the Party that the tasks outlined in Winston's report remained the guide to industrial concentration, and she concluded that "building the Party among the workers in industry is linked to our ability to fulfill the tasks history has placed before our Party." By this date, the Party was active in key shops in the auto industry, the longshore industry, as well as in the steel and rubber industries (Ex. 65E).

The New York State and New York County organization of the Communist Party gave special emphasis to concentration in the critical transportation industry. Thus, the longshore, teamsters and railroad sections of the Party

operated directly under the State Party leadership (Tr. 3884–87). A New York County Committee meeting of the Party which included among those present petitioners Charney, Weinstone and Lannon (Tr. 3968–70) was concerned with the progress of the Party's concentration task in the following focal points of the transportation industry: the Pennsylvania Railroad yards, the New York Central freight yards, and the waterfront along the Hudson River with its longshoremen, seamen, and teamsters (Tr. 3892–93; 3948–50; Ex. 64B). The importance of the transportation industry to the Party's concentration activity is emphasized by the statement of the national organizer in the railroad unit of the Communist Party when he met with a group of about thirty-five Party members in St. Louis, Missouri, directing them to recruit the railroad workers: "Remember this, as what Lenin said, you can never hope to have a successful revolution unless you have the railroad workers with you" (Tr. 8952–53).

The Party slogan enunciated by petitioner Bittelman, "Every Shop must become a fortress of Communism, * * *" (Ex. 45D), aptly describes the efforts of the Party in the basic industries.

Late in the summer of 1948, the three members of the New York State Secretariat of the Party met with the government's witness Lautner under conditions of extreme secrecy to set up the under-

ground structure of the Communist Party for New York State, under the plan set forth by William Z. Foster at a National Committee meeting (Tr. 4441–43; 4443–44). Present at this meeting were Robert Thompson, New York State chairman of the Communist Party, a member of the National Board who was convicted in the *Dennis* case and became a fugitive; William Norman Marron, a fugitive named as a defendant in the instant indictment; and Hal Simon.

Thompson drew an outline for the Party's underground structure, dividing the state into three areas (Tr. 4443–53, Ex. 82). The complete structure took in seven levels (Tr. 6126, Ex. 82). The structure was designed in such a way that any one person knew the identity of only six other members of the underground (Tr. 4453). Thompson stated that experience in Europe indicated that this structure would give the utmost protection to every Party member integrated into the structure, and would guarantee that the Party would function under any and all conditions as an organized force (Tr. 4453). By the end of 1949, the New York State underground structure had been built in Area One to the 6th level (Tr. 6141), in Area Two to the 4th level (Tr. 6137, 6139), and in some parts of Area Three to the 5th level (Tr. 6138).

In addition to the vertical underground structure, certain other measures were taken, for which petitioner Charney coined the phrase "horizontal"

structure (Tr. 4473), to prepare for the underground activities of the Party. These measures included provisions for hiding Party leaders, message centers, printing apparatus, acquisition of paper supplies in such manner as to conceal the source, storing Party literature in secure places, and obtaining high-powered radio receiving and transmitting sets (Tr. 4454–65, 4473–74). Also, there were assembled lists of Party members who could be entrusted with sums of money up to $20,000 each (Tr. 4487–89).

These preparations were not restricted to New York. The evidence showed that similar steps were also taken in St. Louis (Tr. 9000–1), Ohio (Tr. 8204–5, 8435), and Detroit (Tr. 7200, 7230, 7271–74).

The foregoing program was in addition to other measures taken by the Party and these petitioners throughout the country. These included: breaking the sections and clubs into small groups (Tr. 3951; 3967; 3994; 7203–4; 7253–56; 8409); destruction of membership lists and discontinuance of issuance of Party membership cards (Tr. 6635; 7235; 7257–58; 8205; 8409; 8439; 8441–42; 8695; 8733; 8997); forbidding use of the telephone or mails on important Party business (Tr. 4396–9, 7200, 8408–9); and use of false names (Tr. 1919; 3186; 3353; 12741; Exs. 69, 118, 120). These measures were a revival of similar secret and conspiratorial measures used by the Party in

the 1930's (Tr. 1916–19; 1961; 2443–44; 2720–24; 3317–18; 6253; 6294; 7509).

At the June 1945 National Committee meeting attended by petitioners Lannon, Bittelman, Trachtenberg, Jerome, Mindel, Weinstock, Gannett and Flynn, as well as many of the co-conspirators named in the indictment, the initial action was taken toward returning the Party to its revolutionary Marxist-Leninist line, after the Communist Political Association period of the Party (Tr. 2086–2087). Thus, at this meeting co-conspirator Williamson instructed that:

> The first task connected with the present-day functioning of the CPA as a Marxist political party, is that of organizing the most thorough study of Marxism-Leninism by the membership and all our cadres * * * that during the summer, and in preparation for the reopening of schools in the fall, there shall be instituted an examination of the curricula, outlines, textbooks, methods of teaching and personnel of all schools. This shall be combined with an intensive course of re-educating the educators (Ex. 15F).

This emphasis on the return to true Marxism-Leninism via lectures and schools was carried out at the emergency convention itself. Co-conspirator William Z. Foster, the leader of the Party, spoke at the emergency convention attended by petitioners Lannon, Trachtenberg, Jerome, Bittelman, Johnson, Jones, Weinstock, Gannett and

Flynn (Tr. 3851–54) concerning the forthcoming tasks in the struggle against Browder's revisionism, as follows:

> "As never before, we must train our Party in the fundamentals of Marxism-Leninism. To this end we must check over the curricula, teaching personnel and textbooks of all our schools" (Ex. 22D).

On the national level, two commissions were concerned with educational duties, the Educational Commission and the National Training School Commission (Ex. 74A). Petitioner Flynn testified that the National Board "recommended" the subject matter to be taught in Party schools (Tr. 12656). What courses were to be taught, how they were to be conducted, when they were to be held and who was to attend, were some of the problems which came before these Commissions (Exs. 62F, G, 73). These Commissions reported directly to the National Board or National Committee, and their directives were passed on to the State or District Boards. On the State level, at least in New York, the Training School Commission was under the aegis of the Educational Commission (Ex. 74A; Tr. 406). The decisions of the State Board were in turn handed down to the county organization which also had its educational director; thence to the section level and the club level, both of which had their own educational directors (Exs. 74A, 62F and G). In this manner, decisions which emanated from

the National Commissions were disseminated through the Party organization to the lowest level—the community branch or shop club.

Petitioners Jerome and Gannett were members of the National Educational Commission during the period of the conspiracy (Tr. 4266) and from 1947 to the indictment in 1951 petitioner Gannett was in charge of the National Education Department (Tr. 12658, 12662); petitioner Weinstone was head of the New York State Educational Commission at the same time (Tr. 4263); petitioner Mindel was head of the National Training School Commission when the witness Lautner went to the 1941 National Training School (Tr. 3585). Petitioner Gannett as education director of the Party reported directly to the National Committee (Tr. 12662).

Party schools were conducted at all levels. There were National Training Schools (Exs. 62G, 113; Tr. 3180, 3581, 7364, 7741); Regional Training Schools (Ex. 111; Tr. 7723, 8309); State Schools (Ex. 73; Tr. 8998); Section Schools (Tr. 3378, 4081–2); Community Schools (Tr. 6597); and Club Schools (Tr. 4081, 7716).

The extent to which the Party leadership was indoctrinated in the principles of Marxism-Leninism may be seen in a report by petitioner Weinstone to the 1948 New York State Convention. He stated that the New York State party had organized 40 full-time, carefully supervised training schools which were attended by 572 high level function-

aries. Of this total, twenty-six were 9-day schools which enrolled 272 comrades, chiefly from the shops of concentration clubs. Since many of the industrial workers could not leave their employment to attend a full time school even for a short period, 60 special training schools were organized for industrial and trade-union leaders, which were attended by 514 functionaries (Ex. 73; Tr. 4081–82). A renewed program must be undertaken by the State Committee, Weinstone stated, which would assume responsibility for training a substantial number of branch leaders in the industrial and concentration areas. This training must assume a new and higher quality because: "The present situation demands that our leading personnel be more advanced in the knowledge of Marxism-Leninism." In addition to emphasizing organized classes, Weinstone stressed the importance of independent self-study in mastering the theory of Marxism-Leninism (Ex. 73, Exs. 68A, B, C).

At the same time that this cadre or leadership training program was being carried out, there was also under way a program for Party members. In New York alone, between 1945 and 1948, approximately 8200 Communist Party members attended schools and classes which were directed by the State Educational Department. Over 425 club classes had been organized during the same period (Ex. 73). This activity was part of the over-all national program to give at least an in-

troductory course in basic Marxist-Leninist principles to 25,000 club members and additional thousands of new recruits. The New York State Educational Commission of the Communist Party, under the direction of Weinstone, gave "unstintingly" of both forces and money to achieve this aim (Exs. 73, 62F and G).

Most of the petitioners, together with their co-conspirators, were at different times students, teachers or administrators in Party schools (Tr. 3187, 3353, 3378, 3582, 7369, 7414, 7725, 7744, 7746, 7747, 7758). The record contains testimony about teaching at approximately fifteen different Communist Party schools and classes (Tr. 3352, 3378, 3582, 4060, 4343, 6598, 6602, 6608, 7365, 7723, 7725, 7744, 7750, 8328). As stated above, the schools were conducted at all levels of the Party, extending from National Training Schools* attended by high Party leaders, to

* The National Training Schools represented the ultimate in Party education. In October 1947, a National Training School was held in New York in which petitioners Bittelman, Jerome, Gannett and Mindel, together with co-conspirators Siskind and Williamson had taught classes (Tr. 7746, 7761–62). Petitioner Jerome, in urging the students to concentrate on the Communist classics, told them they should remember that "Marxism-Leninism is not a dogma but a guide to action" which "we do not read in the abstract like esthetes" (Tr. 7758).

Siskind stated:

"* * * that the history of all revolutions, particularly the three Russian revolutions of this century, show the true revolution as distinguished from mere reform, that can only come about through violent, forceful action on the part of

the new-member classes attended by recent recruits. Almost invariably the entire student body was told to use only first names or aliases, to be careful about sending and receiving mail, and to be guarded in the use of the telephone (Tr. 7727–9, 8330, 8998, 9056–7).

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the oppressed class, aimed at the ruling class; that, therefore, only by violent, forceful action on the part of an armed proletariat could the capitalistic state machinery and the capitalistic society, the capitalistic class, be destroyed" (Tr. 7731).

Petitioner Mindel headed the 1941 National Training School which was limited to seven students, four of them district or state organizers and the other three high Party officials (Tr. 3581–6, 3846). Co-conspirator Siskind taught the students that in bourgeois democracies it is impossible to establish socialism except by revolution (Tr. 3587, 3590; Ex. 56); that specifically as to the United States of America the fundamental political demand is "direct transition" to the dictatorship of the proletariat and that transition would be made "by the destruction of the bourgeois state, complete destruction of the bourgeois state" (Tr. 3647–48; Ex. 57B). Siskind taught, from "Problems of Leninism" by Joseph Stalin (Ex. 47E), that the "peaceful transition" theory is the theory of the reformists, and has "nothing in common with Leninism" (Tr. 3663–4), and that—

"* * * peaceful co-existence is not possible for a long period. For a certain period of time, a transitionary period of time, that is to the advantage of the Soviet Union, that will gather its strength and it will be in a better position for a final struggle against imperialism. That is a Leninist policy. That is a revolutionary policy. That is not a pacifist policy" (Tr. 6277–8).

Petitioners Trachtenberg, Flynn and Bittelman participated in the 1938 National Training School (Tr. 7414, 7370). As a climax to their six months' training, Bittelman told the students:

These schools and classes taught the students that the Communist Party is an international party based on the principles of the proletarian revolution and the dictatorship of the proletariat (Tr. 3404–05); that, because of the refusal by the capitalists to accede, socialism can only come about by the seizing of power and the overthrow of bourgeois society under the leadership of the Communist Party (Tr. 6608–10); that under bourgeois democracy it is easier to prepare the working class for the seizure of power (Exs. 116, 7, 70H); that the only way the working class could free itself was by "violent revolution" and "overthrow of the capitalist class" (Tr. 8338, also cf. Tr. 7730); that Browder was under the mistaken conception that the contradictions of capitalism could be peacefully resolved (Ex. 115); that the method by which Communism would come to power in this country was through violent forceful action by the proletariat in order

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"* * * that in order to have a victorious revolution and in order for the working class to be able to defeat one's own government, to overthrow one's own government, and to seize power, in order to establish a victorious dictatorship of the proletariat, it was necessary to have a party of a new type, a type of party that Lenin built and taught the Bolsheviks to build in Russia, a Communist Party, a party that was grounded in the fundamentals of Marxist-Leninist theory * * * a Communist Party of this type which was being built in the countries throughout the world could carry through a successful revolution, could overthrow one's own government, seize power and establish the dictatorship of the proletariat, that would continue to smash the rule of the old state and set up the new Soviet rule" (Tr. 7416–17).

to destroy the capitalistic state machinery and the capitalistic class (Tr. 7731).

In addition to the classes and schools, the Party also organized the sale and distribution of the Communist Party classics for independent self-study in mastering Marxism-Leninism (Tr. 3125, 3374, 3380–2, 3406, 3482, 4473, 6642, 7716, 8087; Exs. OOO series, NNN series, 73, 68A, B, C). Thus, an important tool of the conspiracy was International Publishers which published the Marxist-Leninist classics and most of the exhibits involved in this case. This publishing concern has been headed, at least since 1935, by petitioner Trachtenberg (Tr. 1966, 2273). As head of International Publishers and in his capacity as a leading Communist Party functionary, Trachtenberg made reports to meetings of the National Committee concerning the sale and distribution of Marxist-Leninist literature (Tr. 2273).

There was no serious dispute at the trial as to the use by the Party and these petitioners of the Marxist-Leninist classics as basic text-books in the schools, classes and clubs. Indeed, they have not contested that fact here (e. g., Pet. 54, 66).

As in the *Dennis* case, the evidence here shows that the core and keystone (Ex. 47C) of the Communist Party's program for accession to power is the dictatorship of the proletariat. The ramifications inherent in the dictatorship of the

proletariat are set forth over and over again in the Marxist-Leninist classics used in the Party schools. As defined by Stalin in classic and well-known words:

> * * * the dictatorship of the proletariat is the domination of the proletariat over the bourgeoisie, a domination that is untrammeled by law and based on violence and enjoys the sympathy and support of the toiling and exploited masses * * * (Ex. 4E).

It was proved here, as in *Dennis*, that the dictatorship of the proletariat is the fundamental thesis of Marxism-Leninism, and it cannot exist without violence (Exs. 4B, 4E, 7B, 7D, 90, 47F, 59B, 59D, 59E). The dictatorship of the proletariat can be established only by the violent overthrow of the existing capitalist government—that is, by the proletarian revolution. History teaches us, according to Marxist-Leninists, that no entrenched bourgeoisie will peacefully yield its power and that, therefore, the only method of achieving power is by violent overthrow of the ruling class and its government. As analyzed in "The History of the Communist Party of the Soviet Union" (p. 9):

> Marx and Engels taught that it was impossible to get rid of the power of capital and to convert capitalist property into public property by peaceful means, and that the working class could achieve this only by revolutionary violence against the bour-

> geoisie, by a *proletarian revolution,* by establishing its own political rule—the dictatorship of the proletariat—which must crush the resistance of the exploiters and create a new, classless, Communist society (Ex. 9T).

Lenin expressed the same thought in "State and Revolution" as follows (pp. 19–20):

> We have already said above and shall show more fully later that the teaching of Marx and Engels regarding the inevitability of a violent revolution refers to the bourgeois state. It *cannot* be replaced by the proletarian state (the dictatorship of the proletariat) through "withering away," but, as a general rule, only through a violent revolution * * *
>
> The replacement of the bourgeois by the proletarian state is impossible without a violent revolution. * * * (Ex. 7B).

Stalin wrote:

> Can such a radical transformation of the old bourgeois system of society be achieved without a violent revolution, without the dictatorship of the proletariat?
>
> Obviously not. To think that such a revolution can be carried out peacefully within the framework of bourgeois democracy, which is adapted to the domination of the bourgeoisie, means one of two things. It means either madness, and the loss of normal human understanding, or else an open and gross repudiation of the proletarian revolution * * * (Ex. 59C).

See also Exhibits 4E; 9M, 9P, 9Q, 9R, 9S, 57A, 47E, 47C.

The doctrine of Marxism-Leninism teaches that before the existing capitalist government may be overthrown, a "revolutionary situation" must exist. Two types of factors must coincide before a successful revolution can be carried out. These factors are described as "subjective conditions" and "objective conditions" (Ex. 70M).

Objective conditions are beyond the control of any individual and will arise as a result of the inherent contradictions of the capitalist system. Lenin describes the objective conditions as follows: 1. It is impossible for the ruling classes to maintain their power unchanged, due to a national crisis affecting both the exploited and the exploiters; 2. The wants and sufferings of the oppressed class become more acute than usual; 3. In consequence of the above there is a considerable increase in the activity of the masses who in stormy times are drawn into independent historic action (Ex. 57D).

Not every revolutionary situation, however, leads to revolution. To the objective conditions must be added subjective ones—"* * * namely, the ability of the revolutionary *class* to carry out revolutionary mass actions *strong* enough to break (or to crack) the old government, which never, not even in a period of crisis, 'falls' unless it is 'dropped'" (Exs. 57D, 70M).

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At the trial, petitioners stressed their day-to-day activities and claimed that they advocated a peaceful transition to socialism by means of reforms. However, Stalin's "Foundations of Leninism" (Ex. 4C), declares:

> The revolutionist will accept a reform in order to use it as a means wherewith to link legal work with illegal work, in order to use it as a screen behind which his illegal activities for the revolutionary preparation of the masses for the overthrow of the bourgeoisie may be intensified.

The "History of the Communist Party of the Soviet Union" (Ex. 9Z, p. 111) teaches:

> Hence, the transition from capitalism to Socialism and the liberation of the working class from the yoke of capitalism cannot be effected by slow changes, by reforms, but only by a qualitative change of the capitalist system, by revolution.
>
> Hence, in order not to err in policy, one must be a revolutionary, not a reformist.

At the trial, petitioners also contended that the united front policy developed at the Seventh World Congress of the Communist International in 1935 is still applicable, and that under this policy a peaceful transition to socialism is possible by means of a coalition government (A. App. 154 et seq.). But the evidence shows that Marxist-Leninists do not regard the united front policy as affecting any basic changes in the theory of the proletarian revolution and the dictatorship

of the proletariat. Exhibit 70–O refers to the "new tactical orientation" (p. 36) developed by the Seventh World Congress. Dimitroff, the prime exponent of the united front tactic, stated:

> But while it is sufficient for the establishment of the united front of the Communist and Social-Democratic Parties to have an agreement of struggle against fascism, the offensive of capital and war, the achievement of political unity is possible only on the basis of a number of definite conditions involving principles.
>
> * * * * *
>
> *Third,* on condition that the necessity of the *revolutionary overthrow of the rule of the bourgeoisie* and the establishment of the *dictatorship of the proletariat in the form of Soviets* be recognized * * * (Ex. 29). [Italics in original.]

Lenin and Stalin both specifically stated that the law of violent proletarian revolution is applicable to the United States (Exs. 7C, 4B). Petitioners and their co-conspirators have specifically approved and relied upon these words of the masters of communism in schools for teaching and advocacy. (See Ex. 70J, p. 16.)

ARGUMENT

1. *The Charge.*—The petitioners contend that their conviction must be set aside because the trial judge failed to instruct the jury that they must look only to the acts and declarations of

each defendant, or those of other persons affirmatively authorized or ratified by such defendant, in determining whether such individual defendant specifically intended to bring about the violent overthrow of the government of the United States as speedily as circumstances would permit. That is, they contend that the charge erroneously permitted the jury to consider the acts and declarations of co-conspirators in determining whether each defendant had such an intent. This contention is premised upon the petitioner's reading of this Court's decision in *Dennis* v. *United States,* 341 U. S. 494, as holding that the existence of such a specific intent is a constitutional prerequisite to the application of the Smith Act, which, they assert, otherwise would be constitutionally vague (Pet. 14–21). From this basis, they argue that the requisite intent must be actual and personal to the particular defendant, and, as such, can be determined only from his own acts and declarations or those of others which he has specifically authorized or ratified. Conversely, they contend that under the Smith Act, uniquely, the acts and declarations of co-conspirators may not be considered in determining the intent of a defendant. We submit, with the court below (A. App. 189–192), that the contention is without merit.

The trial judge refused to give a charge requested by petitioners which embodied their

present contention (Pet. 22), and the court below expressly approved, holding that ordinary conspiracy rules controlled and that "the rule admitting acts and declarations of co-conspirators in furtherance of the conspiracy against all defendants applies equally to motive and intent as to other issues." (A. App. 189–192.) However, the court below may have found that the judge actually charged the jury in accordance with the substance of petitioner's contention. Thus, in its opinion, the court below went on to state that "The appellants also contend, in effect, that the ordinary conspiracy rule—requiring a showing of conspiracy, including in this instance the requisite unlawful intent, to be made against each defendant, before the acts and declarations of third parties are admissible against him—was not observed by the trial judge. They say that it appears from the charge that the Court considered that participation in the conspiracy did not involve showing that a defendant intended to cause the violent overthrow of the Government, but rather that intent was a separate issue from participation." (A. App. 193.) Thereafter, the court below concluded that "we do not think that any part of the charge can properly be read as meaning that a defendant could be found to be a 'participant' in the conspiracy charged without possessing such an intent" and that such intent must be found "on the basis of each de-

fendant's own conduct" (A. App. 195–196).[1] Reading together both portions of the opinion of the court below, it may have meant, what we do not question, that participation in a conspiracy must include knowledge of the general nature of the conspiracy, and that there must be evidence that a particular defendant participated with such knowledge before the acts and declarations of co-conspirators can be attributed to him as proof of his specific intent or ultimate purpose. However, if the court below held that to show each petitioner's participation in the conspiracy there must be independent proof (before considering the acts and declarations of co-conspirators)

[1] The Court of Appeals noted that the trial judge instructed the jury that the participation of a particular defendant must be determined "without regard to and independently of" the acts and declarations of others (A. App. 196). The trial judge then told the jury "participation" meant wilful participation which he defined as—

> with the specific intention and for the evil purpose of bringing about the overthrow or destruction of the Government of the United States by force or violence (A. App. 167).

Since the trial judge charged that initial participation of a defendant in the conspiracy could be shown only from a defendant's own acts and declarations and then stated that initial participation must include a finding of the specific intent to overthrow the Government by violence, the Court of Appeals may have considered that he had charged that such specific intent could be found only from a defendant's own acts and declarations.

of his specific intent to bring about the violent overthrow of the Government, we think it erred, and that, if the trial judge gave such a charge to the jury, it was unduly favorable to the petitioners.

a. Contrary to the petitioners, we cannot find in the opinion of Chief Justice Vinson, or in the concurring opinions of Justices Frankfurter and Jackson, in *Dennis* v. *United States, supra,* any intimation that the Constitution (as distinguished from the statute) limits the application of the Smith Act to those persons who, in addition to engaging in conduct prohibited by that Act, do so with the specific intent of bringing about the violent overthrow of the Government of the United States as speedily as circumstances would permit. Instead, the late Chief Justice stated (341 U. S. at 499):

> Congress was concerned with those who advocate and organize for the overthrow of the Government. Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow. We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence.

Thus, the opinion holds both that the intent requirement derives from the statute (rather than

the Constitution), and also that the existence of the requisite intent is to be determined from the inherent nature of the conspiracy and from other facts and circumstances. Here and elsewhere (341 U. S. at 500), the Court appeared to assume that the element of intent was to be established as in criminal cases generally. Moreover, we submit that none of petitioner's quotations (Pet. 18–20) from the opinions in *Dennis* v. *United States*, *supra*, suggests that without such a specific criminal intent the Act would be unconstitutionally vague as applied to leaders of the Communist Party of the United States.

b. It is well established that the criminal purpose or intent of a party to a conspiracy may be established by proof of the acts and declarations of co-conspirators in furtherance of the conspiracy. Thus, in *Pinkerton* v. *United States*, 328 U. S. 640, 647, this Court stated that "Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. *Wiborg* v. *United States*, 163 U. S. 632, 657–658." See also *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249, and *American Fur Co.* v. *United States*, 2 Pet. 358, 365. The trial judge clearly charged the jury that the acts and declarations of alleged co-conspirators could not be attributed to a particular defendant without other and independent evidence that he had combined with them. Such a charge, which permitted the jury to determine from the acts and declarations of the conspirators

both the purpose of the conspiracy and the intent of each conspirator, was in accord with the settled principles. Under the petitioners' contention, especially since intent is so large an element in the crime of conspiracy, it is hard to see what value the acts and declarations of co-conspirators could have as a proof of the conspiracy if, before using them, the jury must find from independent evidence both the existence of a combination and the specific purpose and intent of its participants (as distinct from knowledge of the general purpose of the conspiracy which participation implies). *United States* v. *Dennis,* 183 F. 2d 201 at 230–231. In the present case, as in *Dennis,* the most significant evidence of each petitioner's purpose is found in the operations of the Communist Party of which he or she is a directing spirit, rather than in isolated personal acts and declarations.

In brief, the petitioners seek to make the Smith Act unenforceable by engrafting upon it rules of evidence and procedure unknown to other Federal criminal proceedings. As Mr. Justice Jackson put it in *Dennis* v. *United States,* 339 U. S. 162, 174, "Courts should give to a Communist every right and advantage that they give to any defendant. But it is inconceivable that being a Communist can entitle a defendant to more."

2. *The denial of a hearing on the issue of "clear and present danger."*—In their "Questions Presented," petitioners list the question of whether (Question 3, Pet. 2) they "were entitled to a trial

or hearing of the issue of clear and present danger by either the trial judge or the jury." The trial judge denied such a hearing. In the Court of Appeals, the petitioners did not present the question of whether they were entitled to such a hearing, but proceeded on the assumption that this issue, as defined in *Dennis* v. *United States, supra,* was determinable by the Court of Appeals through taking judicial notice of historical and current events. In their present petition, the petitioners do not discuss this hearing issue beyond listing it under their Questions Presented. Under these circumstances they may be precluded from raising the question in this Court.

In *Dennis,* 341 U. S. at 510, this Court held that the clear and present danger concept, as applied to the Smith Act, means that:

> * * * In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.

It was specifically held (p. 513) that this "is a judicial rule to be applied as a matter of law by the courts" and that (p. 515) "the issue is properly one for the judge to decide."

Moreover, there is not the slightest suggestion in this Court's decision in *Dennis* that the trial judge in a Smith Act case must hold a hearing, as requested by the petitioners, for the purpose of determining whether their conspiracy, viewed in

the light of recent world conditions and Communist activities, presents such a danger that the Smith Act may be applied. As in *Dennis*, such a conclusion of law can be drawn by appellate courts as well as by trial judges, with or without a hearing. Such a conclusion does not involve a finding of fact in the usual sense, but rather a determination that there exist circumstances, including the nature of the Communist Party and the international relationships of the United States, which would justify Congress in concluding that petitioners' conspiracy endangers fundamental interests of the nation. It is clear that the *Dennis* principle was so applied in that case. Thus, the opinion of Chief Justice Vinson, in which Justices Reed, Burton and Minton joined, expressly approved the concurrent legal conclusions of the trial court and Court of Appeals, based upon judicial notice rather than a hearing record, that the requisite danger existed (341 U. S. 510–511). The nature and function of these conclusions was further defined by Mr. Justice Frankfurter in his concurring opinion, as follows (341 U. S. at 547):

> * * * But in determining whether application of the statute to the defendants is within the constitutional powers of Congress, we are not limited to the facts found by the jury. We must view such a question in the light of whatever is relevant to a legislative judgment. We may take

> judicial notice that the Communist doctrines which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country. We may take account of evidence brought forward at this trial and elsewhere, much of which has long been common knowledge. In sum, it would amply justify a legislature in concluding that recruitment of additional members for the Party would create a substantial danger to national security.

Against this background, Mr. Justice Frankfurter added (341 U. S. at 551):

> To make validity of legislation depend on judicial reading of events still in the womb of time—a forecast, that is, of the outcome of forces at best appreciated only with knowledge of the topmost secrets of nations—is to charge the judiciary with duties beyond its equipment.

Similarly, Mr. Justice Jackson concluded that "The judicial process simply is not adequate to a *trial* of such far-flung issues" (341 U. S. at 570 [emphasis added]).

We submit that there was plainly no error in the trial judge's denial of a hearing on this issue.

3. *The existence of a "clear and present danger."*—Petitioners contend that "Neither the evidence adduced at the trial nor the facts judicially noticed by the trial judge showed the existence of

the clear and present danger, as defined in *Dennis*, which is necessary to the constitutional application of the Smith Act" (Pet. 32–52). This contention misreads the *Dennis* decision.

The jury's verdict established, conclusively for this aspect of the case, that the petitioners conspired to teach and advocate the violent overthrow of the Government of the United States with the specific intent to bring about such overthrow as speedily as circumstances would permit. The Government's evidence showed that this conspiracy was carried on through the Communist Party of the United States, and that these petitioners were top leaders of the Party in close collaboration with the *Dennis* defendants. The *Dennis* defendants were indicted in July 1948, and were convicted in October 1949. In *Dennis*, this Court stated that it was in accord with the conclusion of the trial judge in that case, as articulated by the Court of Appeals (183 F. 2d at 212–213), that the American Communist conspiracy, in the context of world conditions, presented the requisite degree of danger. In essence, the instant case involves leading participants in the same conspiracy during the period from June 1948 to June 1951, when the indictment was returned. Judge Dimock's conclusion as to danger in this case was based upon the same factors which this Court approved in *Dennis*, reinforced by later evidence of Communist infiltration and aggression in such areas as Korea and

Indo-China (Tr. 13671–3). Surely, as the court below noted, "if the danger was clear and present in 1948, it can hardly be thought to have been less in 1951, when the Korean conflict was raging and our relations with the Communist world had moved from cold to hot war" (A. App. 205–206).

The thrust of the petitioners' argument on this point is that the courts below (and this Court) should come to a contrary conclusion on the basis of petitioners' analysis of the principles and tactics of Marxism-Leninism and of the role played by Communist parties in France, Italy, China, Russia, Germany, and the United States (Pet. 35–52). The petitioners' present version of their Marxist-Leninist program has been rejected by the jury, as noted above. Moreover, leaving aside the well-known fact that nowhere have Communists obtained or risked power in a free and honest election, petitioners' argument again mistakes the judicial function in determining whether the Smith Act constitutionally may be applied. This Court's decision in *Dennis* stands for the proposition that the courts need only determine that there exist circumstances in the context of which the Congress, which has primary responsibility for the security of the United States, could reasonably conclude that the activities prescribed by the Smith Act would endanger that security. This Court's affirmative determination in *Dennis* is controlling here.

Moreover, in 1950, Congress enacted the Internal Security Act (64 Stat. 987), Section 2 of which contains the findings of Congress as to the nature and purposes of the Communist movement abroad and in this country during the period covered by this indictment. Referring to these findings in *Carlson* v. *Landon,* 342 U. S. 524, 535–536, this Court stated that:

> * * * We have no doubt that the doctrines and practices of Communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien Communists under its power to regulate the exclusion, admission and expulsion of aliens.

Similarly, in *Galvan* v. *Press,* 347 U. S. 522, 529, the Court noted that:

> * * * On the basis of extensive investigation Congress made many findings, including that in § 2 (1) of the [Internal Security] Act that the "Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship" * * *. Certainly, we cannot say that this classification by

Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

Thus, it is clear that petitioners are inviting this Court to substitute its judgment for that of Congress as to the impact of their conspiracy upon the security of the United States. In various contexts presented by the Communist threat to the free world, this Court repeatedly has refused to do so.

4. *The sufficiency of the evidence.*—In this Court, petitioners contend that "The evidence was insufficient in law to establish each petitioner's guilt beyond a reasonable doubt" (Pet. 52). The court below stated that "As the appellants on this appeal do not directly challenge the sufficiency of the evidence as a whole to sustain their convictions, we need not consider the evidence in detail, save to say that we are satisfied that it was ample both to require the submission of the case to the jury and to sustain its verdict" (A. App. 188). The petitioners concede that they did not raise or press in the court below the issue as to the general sufficiency of the evidence (Pet. 52–53).[8] It is clear that because of their failure to do so, they are now asking this Court to determine the

[8] Petitioners, recognizing this deficiency, refer to their discussion of portions of the evidence which they cited in argument on other points in their brief in the Court of Appeals (Pet. 52–53).

sufficiency of the evidence from a 17,000-page record without the benefit of a detailed analysis by the court below. This circumstance alone would warrant denial of certiorari on this issue. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502-503; *Blair* v. *Oesterlein Co.*, 275 U. S. 220, 225.

The jury, by its verdict, found that petitioners had an intent to cause the overthrow or destruction of the Government of the United States by force and violence as soon as circumstances would permit, and that it was with this intent and for the purpose of furthering that objective that they conspired to teach and advocate the duty and necessity of overthrowing the Government by force and violence. As shown in the Statement, *supra*, the evidence before the jury substantially paralleled that in *Dennis*. Indeed, these petitioners were found to have conspired with the *Dennis* defendants and were their close and important collaborators. In both cases, the Government presented the testimony of former high-ranking Communists buttressed by the writings of petitioners and their co-conspirators and by other Marxist-Leninist writings endorsed and used to further the conspiracy.

In his charge, the trial judge set forth the defendants' contentions (A. App. 153–158), substantially as petitioners set them forth here (Pet.

52–68).[9] In arriving at their determination of guilt, the jury, with ample support in the record, rejected as incredible the version of the evidence advanced by petitioners that language which seemingly calls for the forcible overthrow of the Government or for the shattering of the governmental apparatus does not mean what it appears to mean.

As the case comes before this Court, the sole issue relating to the sufficiency of the proof is whether "there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 254; *Glasser* v. *United States*, 315 U. S. 60, 80; *Abrams* v. *United States*, 250 U. S. 616, 619. We submit that the evidence which the jury believed not only amply supports, but in fact compels, the verdict which the jury returned.

5. *Lautner's testimony.*—Petitioners contend that admission of the testimony of John Lautner

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[9] The trial judge included in his summary to the jury the contention which petitioners are now advancing: that adoption by the Party in 1935 of the united front policy had changed the basic Party program (A. App. 154). As we have shown in our Statement, there was evidence that the United Front program was merely a "new tactical orientation" which did not affect basic strategy; that the Communist Party would form political unity with any other group only on condition that such a group recognize "the necessity of the revolutionary overthrow of the rule of the bourgeoisie and the establishment of the dictatorship of the proletariat in the form of Soviets." (*Supra*, p. 33.)

as to the circumstances of his expulsion from the Communist Party constituted reversible error in that (1) such evidence was inadmissible as irrelevant and not attributable to the petitioners, and (2) if admissible, its probative value was so outweighed by its tendency to inflame that it should have been excluded. This contention is fully treated in the opinion of the court below (A. App. 196–202). In brief, Lautner, a former chairman of the New York State Review Commission of the Communist Party, testified that he was lured to a cellar in Cleveland and was there threatened with violence and compelled to sign a statement that he had been accused of being a government agent and also that he had received a fair and impartial hearing. As the court pointed out, this evidence tended to prove two of the Government's contentions: (1) that the petitioners' conspiracy as embodied in the Communist Party functioned, not as an ordinary political party, but as a highly disciplined group "such as might be expected of a revolutionary organization," and (2) that Lautner's expulsion was in violation of the provision of the Party's constitution that "all persons concerned in disciplinary cases shall have the right to appear, bring witnesses, and testify." From this evidence that the Party's constitution was not observed in practice, together with evidence of violation of other provisions of that constitution, including those

relating to the election of the National Committee (Tr. 12,069–71), election to the political committee (Tr. 12,099–103), and holding National Committee meetings (Tr. 12,192, 12,197–8), the jury were entitled to disbelieve the provision of the Party constitution purporting to reject the tactics of violence, upon which the petitioners relied heavily in their defense. While Lautner's testimony was dramatic proof of such divergence between precept and practice, its probative value was far too great to warrant its exclusion on any theory of tendency to inflame. And, as the court below pointed out (A. App. 201), the participation of petitioners Weinstock and Trachtenberg, and their co-conspirators Norman, Thompson, Simon and Kling in the Lautner affair, fully justified the admission of Lautner's testimony against all of the petitioners as proof of acts of co-conspirators in furtherance of the conspiracy.

Petitioners' reliance upon the exclusion of this testimony in other Smith Act cases is equally without merit. The question is whether it is competent, relevant and material testimony in this case where its direct link with petitioners and their co-conspirators has been shown.

6. *The challenge to the jury lists.*—Petitioners challenge their conviction on the grounds that "(1) the jury lists, panels and array from which the petit jury was drawn were intentionally and

systematically limited to mere token representation of Negroes, Puerto Ricans and manual workers; (2) the responsible jury officials failed to carry out the statutory and constitutional mandate to employ such methods and procedures as would ensure a representation of a cross-section of the community; and (3) the basic jury list was so weighted with and loaded by the numerically small but economically dominant groups in the community as to preclude a fair and impartial trial in this case in view of the special interest which such groups have in silencing the defendants in a Smith Act prosecution." (Pet. 79–80). We submit that this contention is without substance for the reasons set forth in detail in the opinion of the court below (A. App. 228–249), as well as in the opinion of Judge Dimock (A. App. 27–59). However, we would emphasize that even assuming that improper results were produced by the system of jury administration in the Southern District of New York which was upheld by the court below in *United States* v. *Dennis*, 183 F. 2d 201, the opinions below in the instant case demonstrate that such assumed results were substantially diluted by the time of this trial by the other methods used to obtain prospective jurors since the *Dennis* trial.

7. *The denial of a continuance.*—Petitioners also complain that the denial of their motions for a continuance and for mistrial forced them to

stand trial in a nation-wide "atmosphere of prejudice against them created by agencies of the United States Government" (Pet. 95). This contention was treated at length in the opinion of the court below (A. App. 216–228). It is likewise without merit. Here, as in the *Dennis* case, leaders of the Communist Party of the United States are contending, in effect, that they cannot be tried under the Smith Act as long as there exists widespread rejection of their methods and objectives and those of the Soviet Union. To the contrary, as Judge Hand put it in *United States* v. *Dennis*, 183 F. 2d at 226, dealing with the identical contention, "those who may have in fact committed a crime cannot secure immunity because it is possible that the jurors who try them may not be exempt from the general feelings prevalent in the society in which they live." And see *Shushan* v. *United States*, 117 F. 2d 110 (C. A. 5), certiorari denied, 313 U. S. 574. Petitioners' position differed in no respect from that of those persons who were tried for treason during World War II. *Cramer* v. *United States*, 325 U. S. 1; *Stephan* v. *United States*, 133 F. 2d 87 (C. A. 6), certiorari denied, 318 U. S. 781.

In this Court, the petitioners particularly complain of the alleged prejudicial effect of the issuance in June 1952, during the trial, by the Senate Judiciary Subcommittee on Internal Security of a 16-page pamphlet entitled *Documentary Proof*

that the Communist Party, U. S. A., Teaches and Advocates the Overthrow and Destruction of the United States Government by Force and Violence. They contend that the issuance of this document by a subcommittee of the Congress is proof of their thesis of a deliberate governmental attempt to create against them a climate of prejudice in which they could not obtain a fair trial. This pamphlet consisted in large part of quotations from writings of Marx, Engels, Lenin, and Stalin and from published comments on those writings by American Communist leaders, including the petitioners Weinstone and Bittelman. It also referred to Bittelman as having been indicted under the Smith Act.

The court below correctly held that this matter was without significance in view of the fact that the jurors stated that they had not read the pamphlet, the care with which the jury were selected, and the charge to the jury (A. App. 219–229). Moreover, under the petitioners' contention, the enactment by Congress of the Internal Security Act would preclude their trial for an indefinite period. We submit that in a world context which found the United Nations repelling Communist aggression in Korea, it hardly could be expected that the legislative, political and diplomatic organs of the Government should become silent and inert during this litigation. In any event, the situation was totally unlike that in

Delaney v. *United States*, 199 F. 2d 107 (C. A. 1), upon which petitioners largely rely, for in the *Delaney* case a Congressional subcommittee held widely publicized hearings in the city of trial, focused directly and specifically upon the alleged derelictions for which the defendant was to be tried in a few weeks.

8. *The alleged misconduct of jurors.*—Petitioners contend that the trial judge erred in denying their motion for a mistrial based upon the alleged misconduct and prejudice of jurors and in denying a further hearing on this matter. The contention is fully discussed in the opinion of the court below (A. App. 206–216). In brief, after a Mrs. Julia van Dernoot had telephoned Harold Cammer, a former attorney for the petitioners in this litigation, "to get information on Marxism," and discussed with him a conversation she had had with juror Mrs. Kane, she addressed a letter to the trial judge, during the trial, stating that she had heard Mrs. Kane state that the jurors "felt that the defendants were all Marxists and that Marxists certainly all wanted to overthrow the Government by force." After a careful interrogation of Mrs. Kane and the other jurors, the trial judge excused Mrs. Kane from the jury, but denied petitioners' motion for mistrial. On the following day, one of petitioners' counsel submitted to the trial court an affidavit reciting that on the preceding evening Mrs. Kane

had telephoned counsel to accuse four unnamed jurors of expressing views adverse to the defendants, and moved for a further investigation of the jury and reconsideration of the motion for a mistrial. The trial court denied this motion on the basis of his evaluation of Mrs. Kane's personality and on the ground that his prior interrogation of the remaining jurors left him with a "deep impression" of their impartiality.

The court below was clearly correct in refusing to disturb the painstaking exercise of discretion by the trial judge. *Reynolds* v. *United States*, 98 U. S. 145, 156–157. Moreover, it should be noted that the court below felt that "the circumstances of how this [van Dernoot] letter came into being were far from satisfactorily explained" (A. App. 208). Where a similar issue was presented under strange circumstances in *Dennis* by the so-called Nathanson "affidavit," the court below affirmed the trial court's refusal to remove the challenged juror or to undertake the delicate task of exploring the jurors' mental processes. 183 F. 2d at 228–229. Here, where both these safeguards were employed, petitioners clearly were entitled to no more.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 442

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v.

UNITED STATES OF AMERICA.

MOTION IN SUPPORT OF PETITION FOR CERTIORARI

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The Moving Parties

This motion is presented on behalf of the appellants in *Yates, et al.* v. *United States,* No. 13480, United States Court of Appeals for the Ninth Circuit, on appeal from the United States District Court for the Southern District of California, Central Division; *Huff, et al.* v. *United States,* No. 14320, United States Court of Appeals for the Ninth Circuit, on appeal from the United States District Court for the Western District of Washington, Northern Division; *United States* v. *Mesarosh, et al.,* No. 11169, United States Court of Appeals for the Third Circuit, on appeal from the United States District Court for the Western District of Pennsylvania; and *Wellman, et al.* v. *United States,* No. 12237, United States Court of Appeals for the Sixth Circuit, on appeal from the United States District

Court for the Eastern District of Michigan, Southern Division.

In each of the above cases the appellants have been convicted of conspiracy to violate the Smith Act (18 U. S. C. sec. 371, 2385) and their appeals from such convictions are presently pending before the Courts of Appeals indicated above. In the *Yates* and *Mesarosh* cases oral arguments on the appeals have already been had and the cases submitted for decision. If the Court of Appeals in any of said cases should sustain the judgment of conviction against the moving parties, the moving parties will then petition this Court for a writ of certiorari.

Relief Sought

Through this motion the moving parties respectfully request the Court to grant the petition for certiorari heretofore filed in *Flynn, et al.* v. *United States,* or, in the alternative, to defer action upon said petition pending the outcome of their appeals and the filing of petitions for writs of certiorari, should such steps become necessary.

Reasons for Granting the Motion

Since this Court decided *Dennis* v. *United States,* 341 U. S. 494, more than one hundred persons have been indicted under the Smith Act in various parts of the country. In addition to the cases enumerated above, trials have been completed in Philadelphia, Pennsylvania; St. Louis, Missouri; and Hawaii; while cases are awaiting trial in Denver, Colorado; New Haven, Connecticut; Cleveland, Ohio; and Puerto Rico. In all of the indictments which have thus far been handed down the same conspiracy is charged. Each group of alleged conspirators is charged with conspiring with all of the defendants in the *Dennis* case to accomplish the same objects as the conspiracy charged in that case. In

some of the cases a few co-conspirators in addition to the *Dennis* defendants are also named in the indictment. In all of the cases with the exception of the *Yates* case the conspiracy is alleged to have begun in April, 1945.*

This huge, ever-expanding conspiracy is tried and retried in each case in essentially the same way and on the basis of the same legal theories. The prosecution presents its case through a series of informers who proceed from trial to trial presenting the same testimony. These informers are supplemented by local informers. The "national" informers are usually cast in the role of "experts." They expound in case after case their version of the meaning of Marxist-Leninist theory. They testify also concerning schools that they attended, classes which they taught and individuals whom they knew as Communists in the remote past. When their identification efforts are incomplete, they are supplemented by local informers. The systematic use of these witnesses, subject as they are in political cases to extraordinary pressures to distort, steadily to expand the scope of their recall to meet prosecutive needs, and to misrepresent, has reached proportions which seriously compromise the administration of justice.

Because the experience of these witnesses is necessarily limited, the testimony which they offer is frequently highly remote in time and of dubious competence. In order to overcome the vices inherent in the remoteness of the testimony, the prosecution offers it on the theory that it describes the ends and aims of the Communist Party or that it is "background." Where the testimony as to what has been taught is attributed to a defendant in a particular case, it is admitted to show his intent.

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* In the *Yates* case the original indictment also charged this date as the inception of the conspiracy (*United States* v. *Schneiderman*, 102 F. Supp. 87, 89), but it was superseded by an indictment charging a new starting date, June 28, 1940, the effective date of the Smith Act (106 F. Supp. 906).

Since political expressions necessarily change with changing world conditions, the defendants in these cases, including the moving parties here, find that they are convicted for a version of their teachings which is obsolete and does not correspond to their teaching and advocacy in the indictment period.

Moreover, many of the informers have no personal familiarity with the defendants in these cases and are unable to testify as to their teaching and advocacy. The result is that the defendants are convicted upon the theory that each declarant is really a co-conspirator whose out-of-court statements are binding upon the defendants. The result of this process has been to stretch the conspiracy which forms the basis of the *Dennis* case into an enormous affair covering thousands of participants in all parts of the country and reaching back in time for periods as much as twenty-five years prior to the finding of the indictments. The original thesis of the *Dennis* case that the conspiracy commenced in 1945 with the reconstitution of the Communist Party is likewise discarded in favor of the view that the conspiracy commenced at some unspecified time in the distant past and continues up until the present.

In the same way scant heed is paid in the trial of these cases to the proof necessary to establish each defendant's connection with the conspiracy. In the last analysis the connection is based primarily upon the fact that the defendant is a member of the Communist Party or an officer in one of its organizational bodies. These trials really rest upon a concealed outlawry of the Communist Party; there is no meaningful distinction between open outlawry and a determination that conspiratorial guilt flows from identification with it. Moreover they are wholly inconsistent with—and indeed make meaningless—the provisions of Section 4(f) of the Internal Security Act of 1950 (50 U. S. C. Sec. 487(f)).

Because these cases are tried in essentially the same way, they give rise to common legal issues. While of course there are certain differences among the cases, and points which are raised on the appeal of some of them are not raised on the appeal of others, there are key problems which unify them calling for appellate solution. The cases involved in this motion also present issues which are not presented by the *Flynn* case and the resolution of which would be unaffected by the Court's decision in the *Flynn* case. However, it is also true that each and all of the cases present in common the important issues set out in this motion.

In the *Dennis* case this Court indicated that the decision was to be confined to the facts there presented and that any attempt to expand its scope so as to invade civil rights would not be countenanced. This is the meaning of the Court's warning that (341 U. S. at 516):

> "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution."

All of these cases have been tried in substantial disregard of the duty of courts to administer statutes invading civil liberties with refinement and precision so that those who fall outside their literal reach are assured the maximum protection from intimidation in the exercise of the protected freedoms. It is difficult to ascertain from reading the record in any of these cases that the exercise of constitutional rights is at issue.

This is seen with particular clarity in the administration of the clear and present danger standard. Trial courts in these cases treat the issue of clear and present danger in either of two ways. They may, as in the *Flynn* and *Mesa-*

rosh cases, find the existence of clear and present danger primarily by mechanically lifting the finding of Chief Justice Vinson from the *Dennis* case without regard to the changing political situation. Or, as in the other cases, simply by announcing that there is a clear and present danger without offering any supporting reasons therefor. In the *Yates* case the trial court took neither of these alternatives, but found that clear and present danger was not an element of the offense and that, if it was, it could be established solely by proof of the conspiracy supported by the required intent. Moreover, courts have, as in the *Flynn* case, uniformly refused to grant the accused a hearing on the issue of the clear and present danger and an opportunity to demonstrate that no clear and present danger exists.

All of the cases, like the *Flynn* case, raise such additional questions as these:

1. What is the meaning and content of the *Dennis* rule on clear and present danger?

2. May a judge announce the existence of a clear and present danger on the basis of considerations plucked from his consciousness?

3. If the trial judge does resort to extrinsic data in support of a finding that a clear and present danger exists, what, if any, are the limitations upon the character of the data resorted to?

4. If the process of judicial notice is to be resorted to by the judge, are the defendants to be denied an opportunity to demonstrate that the propositions involved are not properly subject to notice?

5. Can a trial court completely disregard the objective character of the clear and present danger standard by equating proof of clear and present danger with proof of intent?

The trial courts in the four cases involved in this motion treated the issue of proof of individual intent in sharply differing ways. In the *Mesarosh, Yates* and *Huff* cases the trial courts instructed the juries that the specific intent required to satisfy the Constitution is an essential element of the offense and that it has to be proved through the statements made and the acts done or omitted by the accused and not through the statements and acts of third parties. However, in the *Wellman* case the trial court made the same errors complained of in questions 1 and 2 of the *Flynn* petition.

It is not surprising that there repeatedly arises in these cases—as in the *Flynn* case—serious problems of guilt by association. This is a historically recurrent problem which is created when the drive for repression outruns the Constitutional insistence upon proof of individual guilt. The Court should deal with this question now, for it will continue to plague defendants and trial judges in all Smith Act prosecutions.

As a matter of fact, appellate review is required in the *Flynn* case because imbedded in it in one form or another are problems which characterize all of the new "rounds"—the second round, the third round, etc. A denial of the petition will leave these vexing problems unsolved and the boundaries of the *Dennis* case unmarked. Moreover, reverberation of such a denial will unquestionably influence the determination of the pending appeals. Most important, such a denial will stimulate a dragnet use of the

Smith Act and a wholesale intimidation of the exercise of protected civil liberties.

Dated, December 21, 1954.

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Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

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vs.

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Respondent.

PETITIONERS' REPLY BRIEF

The trial judge's charge and the question of intent.

Neither the respondent nor the Court below has come to grips with the basic contention of the petitioners that: The clear and present danger standard as defined in *Dennis* is not sufficiently definite to give fair notice of the circumstances in which utterances are punishable under the Smith Act; hence, the Act may be applied, consistently with the First and Fifth Amendments, only if the accused is shown, by evidence that is rationally probative thereof, to have *actually* and *personally* entertained the specific intent to teach and advocate the overthrow of the Government by

force and violence and to bring such overthrow about as speedily as circumstances will permit (Pet. 14-21). All that the respondent says in answer to this contention is: "We submit, with the court below (A. App. 189-192), that the contention is without merit" (G. Br. 34).* But the Court below said nothing which demonstrates that the contention is without merit. Indeed, one will search its opinion in vain for so much as a *discussion* of the contention.

The first part of petitioners' contention is that if, as a majority of the Court held in *Dennis*,** utterances are punishable under the Smith Act only if they create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent, clear and present danger as there defined does not "give adequate guidance to those who would be law-abiding" (*Musser* v. *Utah*, 333 U. S. 95, 97) of the circumstances in which their utterances will be punishable.

This part of petitioners' contention is sustained not only by the criticisms which Justices FRANKFURTER and JACKSON levelled at the plurality's clear and present danger standard (341 U. S. at 551 and 570, respectively; quoted in Pet. 19-20.‡ It is supported by the plurality opinion itself. For, as we pointed out in the petition for certiorari, at p. 18, that opinion frankly acknowledged that the standard is "indeterminate" and "subject to criticism on the score of indefiniteness" (341 U. S. at 515-516). A standard of guilt which suffers from such shortcomings does not "give adequate guidance to those who would be law-abiding" (*Musser* v. *Utah, supra*). If it can be constitutionally applied at

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* We thus refer to the Government's Brief in Opposition to the petition for certiorari.

** This majority consisted of the four Justices who joined in the plurality opinion of the Chief Justice, and of Justices Black and Douglas.

† Justices Frankfurter and Jackson thought that clear and present danger was not necessary to the constitutional application of the Smith Act. But this does not detract from the force of their criticism of the clear and present danger standard as defined in the plurality opinion.

all, it can be applied only to those who are *actually* possessed of an evil intent; for it is only they who may not complain that the standard fails to "give adequate guidance to those who would be law-abiding." That this was the rationale on which the plurality opinion sustained the application of the Smith Act to the *Dennis* defendants is made clear by the following quotation therefrom, 341 U. S. at 515:

> "There remains to be discussed the question of vagueness—whether the statute as we have interpreted it is too vague, not sufficiently advising those who would speak of the limitations upon their activity. It is urged that such vagueness contravenes the First and Fifth Amendments. This argument is particularly nonpersuasive when presented by petitioners, who, the jury found, intended to overthrow the Government as speedily as circumstances would permit. See *Abrams* v. *United States*. 250 U. S. 616, 627-629 (1919) (dissenting opinion); *Whitney* v. *California*, 274 U. S. 357, 373 (1927) (concurring opinion); *Taylor* v. *Mississippi*, 319 U. S. 583, 589 (1943). A claim of guilelessness ill becomes those with evil intent. *Williams* v. *United States*, 341 U. S. 97, 101-102 (1951); *Jordan* v. *De George*, 341 U. S. 223, 230-232 (1951); *American Communications Assn.* v. *Douds*, 339 U. S. at 413; *Screws* v. *United States*, 325 U. S. 91, 101 (1945)."

When a standard of guilt affecting speech is so vague and indefinite that it does not give adequate guidance to those who would be law-abiding, proof of an accused's evil intent would seem to be the minimum requirement of the First and Fifth Amendments. For it would be as offensive to the prohibitions and guarantees of the First Amendment, as it would be violative of the due process requirement of the Fifth, to apply such a standard to one not possessed of an evil intent (*Winters* v. *New York*, 333 U. S.

507, 517-520). The Court below therefore erred when, disregarding all that was said in this Court in the *Dennis* case, it fell back on its own prior holding in that case, saying: "The appellants' argument encounters at the threshold an obstacle in the *Dennis* case, in which, as appellants seem to recognize, we found the Smith Act constitutional independently of its intent provisions. 183 F. 2d at page 214" (A. App. 190).

It was because the Court below failed to recognize that the Smith Act as construed in this Court in the *Dennis* case is too vague and indefinite to give adequate guidance except, perhaps, to those *actually* possessed of the specific evil intent to advocate and bring about the overthrow of the Government by force and violence, that it failed to appreciate the validity of petitioners' contentions that (1) proof of such intent is not only a statutory, but a constitutional requirement, and (2) since such intent has to be *actually* and *personally* possessed by an accused, in order to support a constitutional application of the Act to him, it may be proved only by his own acts and declarations and those of others which he has actually authorized or ratified. For it is only such acts and declarations that are rationally probative of the *actual* state of mind that must be shown (Cf. Pet. 23-28).

Although the Court below saw nothing in petitioners' contention that the constitutionality of the application of the Smith Act to them depended on proof of their *actual* and *personal* possession of the required evil intent, it held that, even if the contention were valid, it was proper to permit the jury to consider, on the issue of their intent, the acts and declarations of alleged co-conspirators, though not authorized or ratified by petitioners, on the theory that such acts and declarations constituted circumstantial evidence of their intent (A. App. 191-192). To be sure, a man's intent may be proved by circumstantial evidence. However,

as the Court below itself said more than a quarter of a century ago, in *Rumely* v. *United States*, C. C. A. 2, 293 Fed. 532, 551, cert. den., 263 U. S. 713, "Circumstantial evidence is that evidence which tends to prove a disputed fact, by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact exists which is sought to be established." The acts and declarations of one conspirator do not, however, constitute evidence of the state of mind of another. For it is a truism that nothing that one may say or do can ever be evidence of another man's state of mind, unless the latter has actually authorized it or, with knowledge thereof, has adopted or ratified it. The theory on which the acts and declarations of one conspirator are admitted and usable against another in the ordinary conspiracy case, is not that they are *evidentiary* of the latter's state of mind. It is that the latter is *chargeable* with them *as if* he had done and made them himself (Pet. 24-28). Whatever the justifications may be for the use, in other contexts, of one conspirator's acts and declarations against another, they can have no application here. For, as we said at pages 23-24 of the petition for certiorari:

> "Now, it would seem to be equally clear that if a vague and indefinite standard of guilt may be cured by the accused's evil state of mind, the state of mind that must be proved is one that *he himself* has *actually* possessed, and one that is deduced or inferred from facts which are rationally *probative* of an individual's mental state. For the function which the accused's state of mind must perform is to fill the gap in the standard of guilt. That is to say, his *actual* state of mind must be such that he needs no *warning* from the standard. To permit anything else to sustain a conviction under a vague standard of guilt, is to make a mockery of the principle that only an evil state of mind may compensate constitutionally for the lack of warn-

> ing in the standard. *For then the accused may be convicted although he has had neither warning from the standard nor a state of mind that makes warning to him constitutionally unnecessary.*"

Finally, the Court below sought to sustain petitioners' convictions on the theory that the trial judge had instructed the jury not to consider the acts and declarations of alleged co-conspirators on the issue of their intent until they had first found the existence of such intent solely "on the basis of each defendant's own conduct" (A. App. 195-196). The trial judge's charge does not support the theory or assumption of the Court below. Not even the Government suggests that it does. For in its Brief in Opposition it says (G. Br. 36-37):

> "However, *if* the court below held that to show each petitioner's participation in the conspiracy there must be independent proof (before considering the acts and declarations of co-conspirators) of his specific intent to bring about the violent overthrow of the Government, we think it erred, and that *if* the trial judge gave such a charge to the jury, it was unduly favorable to the petitioners." (Emphasis added.)

What the theory of the Court below comes down to is this: That because the trial judge instructed the jury that they had to determine "as to each defendant, whether or not he became a *member* of the conspiracy * * * without regard to and independently of the statements and declarations of others" (A. App. 141), he must *also* be deemed to have instructed them that they could not consider third party acts and declarations as evidence of such defendant's *intent to advocate and bring about the overthrow of the Government by force and violence,* unless they first found on the basis of the defendant's own acts and declarations that he had such intent. The fact, however, is that other

portions of the charge unmistakably show that when the trial judge spoke of "membership" and "participation" in the conspiracy, he did not include, and made it clear to the jury that he did not include, as an element of "membership" or "participation", the specific intent to overthrow the Government by force and violence (A. App. 166-167). Hence, it cannot be said that when he instructed them to determine each petitioner's "membership" or "participation" in the conspiracy "without regard to and independently of the statements and declarations of others", he also meant and they understood him to mean that they should first determine each petitioner's specific intent to advocate and bring about the overthrow of the Government by force and violence without regard to and independently of the statements and declarations of others, before considering such statements and declarations of others. His instruction concerning the manner in which the jury was to determine each petitioner's "membership" or "participation" in the conspiracy, reads as follows (A. App. 141):

> "In considering whether or not a particular defendant became a member of the conspiracy, you must do so without regard to and independently of the statements and declarations of others. *In other words, you must determine the initial participation of a particular defendant from the evidence concerning his own actions, his own conduct, his own declarations, or his own statements, and his own connection with the actions and conduct of others.*" (Emphasis added.)

That the trial judge did *not* intend, by the above instruction, to require the jury to determine each petitioner's intent to overthrow the Government by force and violence "without regard to and independently of the statements and declarations of others" is established by the following: (1) That he made no reference to such intent in the instruction; and (2) that he made it clear to the jury in a

later portion of his charge that such intent was an element of the crime separate and distinct from "membership" and "participation" in the conspiracy, which intent they had to find *in addition* to "membership" and "participation", in order to return a verdict of guilty. Thus, in a section of the charge *which was not at all concerned with the question of what evidence the jury could consider in arriving at a verdict,* he instructed them as follows (A. App. 166-167):

> "If a defendant is to be convicted under this law, he must not merely have conspired to advocate and teach the duty and necessity of overthrowing or destroying the Government by force and violence; the state makes such conduct unlawful only when persons have so conspired 'knowingly' or 'wilfully,' and the indictment so charges these defendants.
>
> "Thus the question of intent enters into the offense charged. *If you find that the defendants, or any one of them, participated in the conspiracy charged in the indictment, one of the questions for you to consider and determine is whether they acted wilfully.* This is a question of their intent. To convict any defendant you must be satisfied from the evidence beyond a reasonable doubt, with respect to him individually, that he had an intent to cause the overthrow or destruction of the Government of the United States by force and violence, and that it was with that intent and for the purpose of furthering that objective that he conspired to teach and advocate the duty and necessity of overthrowing or destroying the Government of the United States by force and violence. And you must further find that it was the intent of the defendant to achieve this goal of the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit it to be achieved.

"Stated another way: I charge you that it is not enough for the prosecution to show the existence of an agreement and the participation therein of any particular defendant. This alone would not prove that such defendant participated in the agreement 'knowingly and wilfully.' With respect to each defendant, the prosecution has the further burden of proving beyond a reasonable doubt that such defendant participated in such agreement wilfully; that is, the prosecution must prove that such defendant entertained the specific intention to teach or advocate the duty or necessity of overthrowing or destroying the Government of the United States by force and violence and that he intended to teach or advocate such doctrine with the specific intention and for the evil purpose of bringing about the overthrow or destruction of the Government of the United States by force or violence, and not that he intended some result other than that." (Emphasis added.)

From which it follows that when the trial judge told the jury, in the instruction which petitioners complain of that except "in determining the question of the initial participation of a particular defendant in the alleged conspiracy," they could consider, as against all the petitioners, all acts and declarations of alleged conspirators during the conspiracy period, he authorized them to predicate their finding of each petitioner's intent on nothing but such acts and declarations.

It is apparent that the Government misconceives petitioners' contention when it asserts that "petitioners seek to make the Smith Act unenforceable by engrafting upon it rules of evidence and procedure unknown to other Federal criminal proceedings" (G. Br. 39). The truth is that the Smith Act has no claim to enforcement, consistently with the First and Fifth Amendments, except in respect

to those who are shown, by evidence that is rationally probative thereof, to have had actually and personally the specific intent to advocate and bring about the overthrow of the Government by force and violence. Hence, petitioners seek only the recognition of their constitutional rights when they contend that the intent necessary to a constitutional application of the Act to them shall be established by such evidence.

As to the existence of clear and present danger.

The respondent's position seems to be that it is not open to the petitioners to contest the existence of clear and present danger. For it says (G. Br. 44):

> "This Court's decision in *Dennis* stands for the proposition that the courts need only determine that there exist circumstances in the context of which the Congress, which has primary responsibility for the security of the United States, could reasonably conclude that the activities proscribed by the Smith Act would endanger that security."

This is obviously wrong. For in *Dennis* the plurality opinion declared, 341 U. S. at 514:

> "We hold that the statute may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the right to prevent. Bearing as it does, the marks of a 'question of law,' the issue is properly one for the judge to decide."

The issue of "clear and present danger" not only bears the "marks of a 'question of law' ". It also includes a most important question of fact. For, as Judge Learned Hand said in *Dennis*, 183 F. 2d at 215:

> " '[C]lear and present danger' depends upon whether the mischief of repression is greater than the

gravity of the evil, discounted by its improbability; and *it is of course true that the degree of probability that the utterance will bring about the evil is a question of fact.*" (Emphasis added.)

If "the degree of probability that the utterance will bring about the evil is a question of fact", it goes without saying that it must be decided on the basis of evidence. For the decisions of courts, no less than those of other departments or agencies of government, "must be the result of a process of reasoning" (Mr. Justice BURTON, *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 136). And "legal reasoning is no different from any other kind of reasoning, unless it be spurious legal reasoning" (Judge LEARNED HAND, *United States* v. *Pugliese*, 2 Cir., 153 F. 2d 497, 500). "Whether a proposition has or has not a degree of probability on definite evidence, does not depend on the state of mind of the person who entertains the proposition. Questions of probability, like questions of validity, are to be decided entirely on objective considerations, not on the basis of whether we feel an impulse to accept a conclusion or not." (Cohen & Nagel, *An Introduction to Logic and Scientific Method*, 157).

The respondent also suggests that this Court's decision in *Dennis* "is controlling here" on the question of clear and present danger (G. Br. 44). That cannot be so, if the question is one that must be decided on evidence, whether adduced in the usual way or judicially noticed. For these petitioners offered to prove to the trial judge and laid before the Court below facts (Appendix to Petition, 95-139), not presented or offered to any court in the *Dennis* case, which require it to be said that there was no probability at or prior to the time of their indictment that any attempt at the violent overthrow of the Government would be made (Pet. 32-52). As a matter of fact, the Government's own

version of the teaching and advocacy of Marxism-Leninism goes far to sustain petitioners' thesis. For at p. 31 of its Brief in Opposition, the Government says:

> "The doctrine of Marxism-Leninism teaches that before the existing capitalist government may be overthrown, a 'revolutionary situation' must exist. Two types of factors must coincide before a successful revolution can be carried out. These factors are described as 'subjective conditions' and 'objective conditions' (Ex. 70M).
>
> "Objective conditions are beyond the control of any individual and will arise as a result of the inherent contradictions of the capitalist system. Lenin describes the objective conditions as follows: 1. It is impossible for the ruling classes to maintain their power unchanged, due to a national crisis affecting both the exploited and the exploiters; 2. The wants and sufferings of the oppressed class become more acute than usual; 3. In consequence of the above there is a considerable increase in the activity of the masses who in stormy times are drawn into independent historic action (Ex. 57D).
>
> "Not every revolutionary situation, however, leads to revolution. To the objective conditions must be added subjective ones—' * * * namely, the ability of the revolutionary *class* to carry out revolutionary mass actions *strong* enough to break (or to crack) the old government, which never, not even in a period of crisis, "falls" unless it is "dropped"' (Exs. 57D, 70M)."

No one—neither the Government nor the courts below—has suggested that there was any probability at or prior to the time of the indictment of the petitioners that any of the aforementioned conditions would arise in the United States. If this be so, how can it reasonably be said that

there was any probability at that time of an attempt at violent overthrow? For, as was said in the Petition for Certiorari, pages 40-41:

> "The charge against these petitioners is that they were adherents of and agreed to teach and advocate the principles of Marxism-Leninism, which the Government contends include the teaching and advocacy of the overthrow of the Government of the United States by force and violence. Now, it would seem clear that if this body of theory teaches that an attempt at governmental overthrow may be made *only* when a host of specified conditions, both subjective and objective, concur—and expressly precludes and prohibits such an attempt in the absence of any of such conditions—the probability of an attempt at overthrow by the adherents of that theory can be said to exist only to the extent that there is a probability that the conditions prerequisite to such an attempt will arise. This must be so, unless there is ground for saying that the alleged conspirators did not really intend to make an attempt at overthrow dependent on the occurrence of such conditions. For in the absence of such ground, it is only on the basis of the agreement actually made by the alleged conspirators, that one can say whether or not there is any probability that they will act. Hence, if they have agreed to act *only* in the context of certain conditions and *not* to act in their absence, it is obvious that the probability of their acting *must* be measured by the probability of the occurrence of the conditions they have set for their acting."

The Government is apparently quite conscious of the fact that a "clear and present danger", even as that phrase was interpreted by the plurality opinion in *Dennis*, cannot be said to have existed at the time of petitioners' indictment. It has therefore evaded, rather than answered, petitioners'

contentions on that score. Thus it relies on *Dennis* as "controlling here", notwithstanding that petitioners have shown by incontrovertible evidence and unanswered argument what was not shown in *Dennis*, namely, that there was no probability at the time of petitioners' indictment that an attempt at the violent overthrow of the Government would be made. It also invokes the verdict of the jury, notwithstanding that the issue of clear and present danger was not submitted to or decided by the jury, but decided by the trial judge. Even if the Government were warranted in saying, as it does at page 43 of its Brief in Opposition, that, "The jury's verdict established, conclusively for this aspect of the case, that the petitioners conspired to teach and advocate the violent overthrow of the Government of the United States with the specific intent to bring about such overthrow as speedily as circumstances would permit," there still remains for determination by this Court the question whether, on the evidence, it is true to say that there was any probability at the time of petitioners' indictment that such circumstances would arise.

Finally, the Government has the hardihood to suggest that because Congress has made certain legislative findings concerning the aims and purposes of the Communist movement (G. Br. 45-46), not even this Court may determine the issue of clear and present danger, nothwithstanding that the constitutionality of the application of the Act to these petitioners depends upon the existence of such a danger (G. Br. 46). That this position is utterly untenable is made clear by the plurality opinion in *Dennis*, which declares, 341 U. S. at 513:

> "When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent

is a judicial rule to be applied as a matter of law by the courts. The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case."

As to the sufficiency of the evidence.

As the petition for certiorari shows, the question of the sufficiency of the evidence was raised "over and over again throughout the brief" in the Court below (Pet. 52-53). Hence, the question is properly raised as one of those presented for review by this Court (*Blair* v. *Oesterlein Mach. Co.*, 275 U. S. 220, 225). It is of more than passing interest that the Government has not denied the following statement at p. 67 of the petition for certiorari:

> "With the possible exception of but one petitioner, there is no evidence that any of them said or did anything during the period covered by the indictment and for many years prior thereto which could reasonably be interpreted as evidence of an understanding or belief that the principles of Marxism-Leninism taught or advocated the duty or necessity of overthrowing or destroying the Government of the United States by force and violence. As to most of them, there is no evidence that they *ever* said or did anything evidencing such an understanding or belief. As for the remaining petitioners, the acts or declarations attributed to them were so remote in point of time, almost all of them antedating the indictment by approximately fifteen years, that they were devoid of a vitality sufficient in law to support a conclusion that they understood or intended the reconstituted Party—which dedicated itself to the achievement, through the

electoral process, of a people's front government, based on an anti-fascist coalition—to teach and advocate the forcible and violent overthrow of the Government."

It would seem clear that if the foregoing is true and if we are right in the contention that the jury could not properly consider the unauthorized and unratified acts and declarations of alleged co-conspirators as evidence of petitioners' specific intent to advocate and bring about the violent overthrow of the Government, the evidence was insufficient in law to establish petitioners' guilt.

Lautner's testimony.

The Brief in Opposition, far from overcoming the contentions made in the petition concerning the admissibility of Lautner's testimony, actually fortifies them. For it exposes the hollowness of the pretense that that testimony—particularly that portion of it which dealt with the personal violence offered Lautner in Cleveland—had any rational tendency to prove any fact relevant to petitioners' guilt. The Government contents itself with repeating the assertion of the Court below that not only the fact of Lautner's expulsion, but the details of the personal violence practiced in Cleveland, was properly admitted, on the theory that it tended to prove "that the petitioners' conspiracy as embodied in the Communist Party functioned, not as an ordinary political party, but as a highly disciplined group 'such as might be expected of a revolutionary organization'" (G. Br. 49). There was absolutely no evidence which would warrant the inference that acts or conduct such as Lautner testified to were within the scope or contemplation of the conspiracy charged in the indictment. The fact that one of the persons alleged to have participated in the Cleveland incident was national treasurer of the Communist Party, and two others were local Party officers, cannot affect the validity of petitioners' conten-

tion. For in the absence of proof that their conduct was authorized or ratified by the Party, it could not be regarded as evidence of the Party's character or purposes (*United States* v. *White*, 322 U. S. 694, 702). And since there was nothing to connect any of the petitioners with said conduct, it follows that the testimony was wholly inadmissible.

The respondent has failed to meet the issues on the jury challenge.

With but a single exception, the respondent makes no attempt to discuss the issues on the jury challenge raised by petitioners. It relies solely upon the general statement that petitioners' "contention is without substance for the reasons set forth in detail in the opinion of the court below * * * as well as in the opinion of Judge Dimock" (G. Br. 51). This reliance on the opinions below leaves unanswered the fundamental conflicts of the opinions with the principles of proper jury selection enunciated by this Court (*Vide* Petition, pp. 86-94).

The sole comment which the respondent makes on any of the issues is embraced in the following:

> "However, we would emphasize that even assuming that improper results were produced by the system of jury administration in the Southern District of New York which was upheld by the court below in *United States* v. *Dennis*, 183 F. 2d 201, the opinions below in the instant case demonstrate that such assumed results were substantially diluted by the time of this trial by the other methods used to obtain prospective jurors since the *Dennis* trial." (G. Br. 51)

But this assertion that "the results were substantially diluted" is not only without support in the opinions below or in the record, it is at complete variance with the facts as acknowledged by both the trial judge and the Court be-

low (A. App. 33, 231-232). For the undisputed fact is that *two out of every three persons who appeared on the basic list at the time the panel for this case was drawn had been selected for jury service during the Dennis period,* i.e., between 1938 and the end of 1948—a period during which the trial judge found, "no attempt [had been made] to reach a cross-section of the population" (A. App. 28).

In view of the foregoing, it would seem clear that petitioners were right when in the petition for certiorari they said (Pet. 85):

> "The trial judge found that throughout the entire ten-year *Dennis* period there was no attempt to achieve a jury list representing a cross-section of those eligible for jury service (A. App. 28). Our recital of the facts shows that during that period, the design of the jury officials was to achieve a jury list which would reflect, not the community, but the upper classes. By placing its imprimatur on a list which is tainted by these methods of selection to the extent of two-thirds of its present members, the Court below has sanctioned methods of jury selection which, if emulated elsewhere—as well they may be in view of the prestige of the Second Circuit—must strike a mortal blow at 'our notions of what a proper jury is [which] have developed in harmony with basic concepts of a democratic society and a representative government' (*Glasser* v. *United States,* 315 U. S. 60, 85). For 'it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community' (*Smith* v. *Texas,* 311 U. S. 128, 130)."

As to the denial of the motions for continuance and mistrial.

The respondent misconceives petitioners' contention on this question. Petitioners do not contend "that they cannot be tried under the Smith Act as long as there exists a

widespread rejection of their methods and objectives and those of the Soviet Union" (G. Br. 52). Their contention —which the respondent should have had no difficulty in grasping—is that they may not, consistently with the requirements of the Fifth and Sixth Amendments, be tried in an atmosphere of all-pervasive hostility and fear which precludes a fair and impartial determination of their guilt or innocence.

The record demonstrates that the conduct of Government agencies and officials induced an atmosphere of prejudgment, fear and hysteria (Vol. VI, Doc. Nos. 179, 180, 202; Vol. VIII, Doc. Nos. 237, 277; Vol. IX, Doc. No. 238) —an atmosphere which was bound to coerce the judgment of the jurors as effectively as a mob clamoring outside the courtroom.

The release by the Senate Subcommittee on Internal Security, while the trial was in progress, of the pamphlet entitled *Documentary Proof that the Communist Party, U.S.A., Teaches and Advocates Overthrow and Destruction of the United States Government,* is but one of the many acts of Government of which petitioners complain. This was not a matter which involved community rejection of the objectives of the petitioners. This was an act of Government calculated to produce community prejudgment of the guilt of the petitioners. The respondent in its brief relies on the holding of the Court below that the release of the pamphlet was of no significance in view of the fact that the jurors had stated that they had not read it (G. Br. 53). But this holding ignores the vital fact that the release of the pamphlet was accompanied by widespread publicity in the daily press in New York City—publicity which focused attention on the most prejudicial aspects of the pamphlet (*Vide* Petition, pp. 96-97). This publicity could hardly have escaped the attention of the jurors.

And finally the distinction drawn by the respondent between the case at bar and *Delaney* v. *United States*, 199 F. 2d 107 (C. A. 1), is no distinction at all. For it cannot be seriously contended that the release during the trial of a pamphlet which touched directly upon the issues of the case and some of the petitioners is to be distinguished from the publicity in *Delaney*, which occurred several weeks prior to the trial.

As to the misconduct of the jurors.

Petitioners' contentions under this head have not been answered by the respondent. The respondent's emphasis on the circumstances surrounding the letter from Mrs. van Dernoot is misplaced. For these circumstances have no bearing on the question of the misconduct of the jurors. While the charge of juror misconduct was first brought to the attention of the trial judge by Mrs. van Dernoot's letter, the facts subsequently uncovered were not based upon information supplied by Mrs. van Dernoot. These facts included the statement by Mrs. Kane that "at least four of the jurors have held and expressed a judgment on the case adverse to the defendants 'right along'; that they expressed their views and judgment 'strongly' to the other members of the jury continuously; that others were less outspoken, but also expressed similar judgments adverse to the defendants."

CONCLUSION

The writ of certiorari should be issued and the judgment below reversed.

Respectfully submitted,

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Of Counsel,
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 442

ELIZABETH GURLEY FLYNN, PETTIS PERRY, CLAUDIA JONES, ALEXANDER BITTELMAN, ALEXANDER TRACHTENBERG, VICTOR JEREMY JEROME, ALBERT FRANCIS LANNON, LOUIS WEINSTOCK, ARNOLD SAMUEL JOHNSON, BETTY GANNETT, JACOB MINDEL, WILLIAM WOLF WEINSTONE and GEORGE BLAKE CHARNEY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 442

ELIZABETH GURLEY FLYNN, PETTIS PERRY, CLAUDIA JONES, ALEXANDER BITTELMAN, ALEXANDER TRACHTENBERG, VICTOR JEREMY JEROME, ALBERT FRANCIS LANNON, LOUIS WEINSTOCK, ARNOLD SAMUEL JOHNSON, BETTY GANNETT, JACOB MINDEL, WILLIAM WOLF WEINSTONE and GEORGE BLAKE CHARNEY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR REHEARING

The petitioners pray for a rehearing of the order of the Court entered on January 10, 1955 denying their petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

This petition is based on substantial grounds available to petitioners although not previously presented.

I

The trial court dismissed that portion of the indictment which charged petitioners with having participated in the organization of the Communist Party. A question is presented whether the remaining portions of the Smith Act which are invoked by the indictment, as construed and applied, absent the charge of conspiracy to organize the Communist Party, violate the First Amendment. This is a question which was not raised in the petition for certiorari, and is of a substantial nature.

The indictment charges petitioners with having violated the Smith Act by conspiring to engage in two separate and independent forms of conduct, each of them in violation of a separate section of the Smith Act. The first branch of the Smith Act invoked by the indictment is that condemning the teaching and advocacy of certain proscribed doctrines. The second branch of the Smith Act which is invoked by the indictment, and which the trial court dismissed as having been barred by the statute of limitations, makes criminal organizing or helping to organize a society or group of persons who teach or advocate proscribed doctrine.

The conspiracy as charged is the same as that charged in *Dennis* v. *United States,* 341 U. S. 494. Indeed, with certain minor exceptions not material here, the conspiracy as charged is the same as that in all the conspiracy indictments which have thus far been brought under the Smith Act. However, in contrast to the *Dennis* case, there is presented for review here a conspiracy which has a single object, namely, teaching and advocacy, inasmuch as the organization charge in the indictment was dismissed.

The elimination of the organizing branch of the conspiracy raises a very substantial issue which should be reviewed here, both because of its impact upon the instant case and upon the constitutionality of the entire program of Smith Act prosecutions.

It seems to be clear that the running of the statute of limitations will eliminate from all future Smith Act prosecutions, as well as from those which have already been tried, where the indictment was brought subsequent to July, 1948* the organizing branch of the conspiracy. But the *Dennis* conviction was sought to be justified by the Government, and was in fact approved by reviewing courts in large part, because the organizing branch of the conspiracy contributed to the case elements which were deemed to nullify the free speech defense. As we show in Supplement I, at every stage in the Smith Act prosecutions the Government and the courts placed heavy emphasis upon the organizing aspect of the case.

Closely related to the organizing aspect of the *Dennis* case was the leadership role of the defendants. It will be recalled that in that case the defendants were found to be a closely-knit, cohesive, policy-making group which exercised its leadership through a series of moves which were designed to reconstitute the Communist Party in 1945. It was the convention of the Communist Party in 1945 to reorganize the Party which was deemed to be the matrix of the conspiracy. This can be most readily recalled by a summary of the indictment in that case. The *Dennis* indictment charged that the defendants conspired to teach and advocate and to organize the Communist Party. The means through which the objects of the conspiracy alleged in the *Dennis* case were to be carried out were the convening of the National Board of the Communist Political Association for the purpose of adopting a draft resolution dissolving the Communist Political Association and organizing the Communist Party, the convening thereafter of a meeting of the National Committee of the Communist Political Association, and the ultimate convening in July, 1945, of a special national convention of the Communist Political Association.

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* The *Dennis* indictment was brought on July 20, 1948, almost the last day prior to the running of the statute of limitations.

The *Dennis* indictment further alleged as part of the conspiracy that the defendants induced delegates to the July, 1945, convention to dissolve the Communist Political Association and to bring about the organization of the Communist Party as a society advocating illegal doctrine, and caused the convention to adopt a constitution basing the Party upon the principles of Marxism-Leninism.

The *Dennis* indictment further alleged that the defendants in that case conspired to have themselves elected as members of a National Committee and National Board of the Communist Party, and assumed leadership of such Party and responsibility for its policies and activities. Further, the indictment charged that as part of the conspiracy the defendants agreed that they would meet from time to time to formulate, supervise and carry out the policies and activities of the Communist Party, and cause various clubs, districts and state units of the Communist Party to be organized.

In short, the heart of the *Dennis* agreement was to engage in certain organizing activities. And this agreement was formed by a small policy-making group within the Communist Party—but not co-extensive with it—to assume responsibility for the acts of organization charged in the indictment.*

The theory upon which the withholding of constitutional protection was predicated in the *Dennis* case was thus a theory that a uniquely dangerous group had engaged in conduct, namely, organizing the Communist Party (or reorganizing the Communist Political Association) which justified denial of the defendants' claim to constitutional protection. This we document in greater detail in our Supplement.

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* The indictment appears at pages 4-6 of Volume 1 of the *Dennis* record, and at 80 F. Supp. 479.

In contrast to all this, there is before the Court in this case a wholly different constitutional issue. The conduct—organizing—through which the top leadership body of the Communist Party carried out the agreement attributed to it is eliminated from the case. Remaining is the pure issue of whether the Constitution inhibits the punishment of petitioners' speech. And in considering this issue, it must be further borne in mind that it is not only that the objects of the agreement are wholly different here, but that the scope of the agreement itself—its participants—are wholly different. The agreement here, as interpreted by the trial judge, appears to have encompassed a large group of individuals whose testimony was received on the theory that Communist functionaries are *prima facie* co-conspirators.*

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* It can hardly be denied that the touchstone for the admissibility of third party declarations in this case was the Communist Party. This contrasts with the *Dennis* case where Judge HAND ruled that certain declarations of Communist Party functionaries subsequent to 1945 were binding upon the defendants there because all of the defendants had at one time or another been members of the National Committee, which is the executive organ of the Party, elected by the national convention; all had also been members of the National Board, a smaller body in which authority was vested between meetings of the Committee. The Court was obviously impressed in the ruling on the admissibility of third party declarations, with the circumstance that the defendants' unique policy-making role and positions of control made them accountable for declarations in execution of Party purposes.

Moreover, the admissibility of this evidence was justified in the *Dennis* case by the Government itself "on the theory that subordinate Party officials who executed the decisions made by appellants are co-conspirators * * *" (Brief on appeal, p. 370). And for that reason, "there was no error in the admission of evidence relating to statements by subordinate officials of the Party and those working with them in execution of appellants' decisions" (*ibid.*, p. 373). In short, the entire basis for the HAND ruling is that the 1945 reconstitution of the Party was the framework of the conspiracy, that the *Dennis* defendants made the decisions in connection with that charged conspiracy, and that they therefore were responsible for the declarations of those who executed their decisions.

We stress the fact that the conspiracy was enlarged in the instant trial not to complain that the declarations of co-conspirators were improperly admitted (although we believe this to be the case), but rather to make it clear that if, as both the plurality opinion and the concurrence of Mr. Justice JACKSON held, the character of the conspiracy is relevant to a resolution of the constitutional issues, then in this respect, too, a new situation is presented here.* It is one thing to say that a small, cohesive, controlling group is a conspiracy which, because of the character of its composition and functioning, requires the withholding of constitutional protections, and a wholly different thing to say that constitutional protections may be withheld on the theory that there is an agreement at large—inferred from common officership in the Communist Party**—solely to teach and advocate proscribed doctrine. We ask the Court to consider whether the prohibitions of the Constitution do not intervene to prevent this enlargement of the boundaries of *Dennis*.

II

A question is presented whether the refusal of the trial court to dismiss the indictment after it had struck out a major section of the one-count indictment violated the Fifth and Sixth Amendments. This is a question which was not raised in the petition for certiorari, and is of a substantial nature.

The trial court refused to dismiss the indictment as a whole upon petitioners' motion, after striking the organ-

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* "It is the existence of the conspiracy which creates the danger", *Dennis* v. *United States, supra,* at 510. This insistence forms the entire basis of the concurrence of Mr. Justice JACKSON.

** We deal below with the contention that review is required here because the rulings of the trial court conflict with Section 4(f) of the Internal Security Act of 1950, 64 Stat. 992, 50 U. S. C. 783(f).

izing branch of the conspiracy (A. App. 135-136). But, as we have shown, the organizing branch of the conspiracy cannot be deemed to be an incidental aspect of an indictment charging teaching and advocacy. After all, the petitioners were committed to Marxism-Leninism and its teaching long before the indictment was brought. The Communist Party is now over thirty years old and during all the years of its existence it has identified itself with Marxism-Leninism and the teaching of it. And it was not until the Smith Act had been on the books for eight years that an indictment was brought against the *Dennis* defendants. What overcame the seeming inertia of the statute was obviously the reorganization of the Communist Political Association in 1945.*

The organizing charge is thus the gravamen of the offense, the specific act which convinced the Department of Justice to seek an indictment from a grand jury.

As this one-count indictment is written, it plainly makes the organizing branch an integral part of the charge against petitioners. In this case, as well as in the *Dennis* case, the Government relied heavily upon the organizing branch of the indictment to establish the boundaries of the conspiracy and to identify those who allegedly participated in it. Indeed, in this case the Government was forced to rely upon the organizing branch of the conspiracy in an effort to establish a bridge between the petitioners and the defendants in the *Dennis* case with whom the indictment charges they conspired. The elimination of the organizing branch of the conspiracy thus removes from the case not an incidental or casual aspect of the conspiracy, but one which must be deemed to be essential to it. No one can say

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* Indeed, the Government apparently thinks that this event is so important that it has charged it as a crime in all the Smith Act conspiracy indictments since *Dennis*, even though the statute of limitations obviously has run.

that a grand jury, mindful of the protections of the Constitution, would have returned an indictment against speech alone had it known that the important organizing charge would ultimately fall because of the lapse of time.

The trial court, in permitting the indictment to stand, improperly altered and amended the indictment as it left the hands of the grand jury, with the result that petitioners were tried and convicted upon an indictment which was not returned by the grand jury. In thus permitting the indictment to stand, the trial court deprived petitioners of the protection of the Fifth and Sixth Amendments. See *Ex parte Bain,* 121 U. S. 1; *Edgerton* v. *United States,* 143 F. 2d 697 (C. A. 9); *Stewart* v. *United States,* 12 F. 2d 524 (C. A. 9).

We must re-emphasize, finally, that this problem will not die with this case. As we have noted, all Smith Act conspiracy cases breed it because the Government persists in seeking organizing indictments despite the lapse of time, and the impact of the statute of limitations.

III

A question is presented as to the impact of Section 4(f) of the Internal Security Act of 1950 upon the administration of the Smith Act. This is a question which was not raised in the petition for certiorari, and is of a substantial nature.

Subsequent to the decision in the *Dennis* case, but before the trial of the instant case, Congress passed Section 4(f) of the Internal Security Act of 1950, 64 Stat. 992, 50 U. S. C. 783(f), providing in part that "neither the holding of office nor membership in any communist organization by any person shall constitute *per se* a violation of subsection (a) or subsection (c) of this statute or of any other criminal statute." The legislative history of this section dem-

onstrates that it was the congressional purpose to create in Section 4(f) a protection against compulsory self-incrimination and guilt by association arising out of admission as to membership or position in the Communist Party. This was obviously made necessary to make operative the statutory scheme for compulsory registration of members of Communist organizations. The method chosen was to proscribe in prosecutions under all criminal statutes the evidentiary use of an accused's membership or officership in the Party.

One of the prime purposes of the Internal Security Act of 1950 was to require Communist organizations to register and divulge their members. In the event of failure of the organization to register (or to list all of its members), the statute imposes a duty of registration upon such members individually (see Sections 6, 7 and 8, 50 U. S. C. 786, 787, 788). Upon registration a host of disabilities is placed upon the organization and its members (see Sections 5, 6, 10, 11, 50 U. S. C. 784, 785, 789, 790). Early in the history of the legislation before the Senate it was pointed out that the registration requirements might well compel self-incrimination under Section 4(a) of the bill (now 50 U. S. C. A. 783(a)) dealing with conspiracy to establish a foreign dictatorship under foreign control (81st Cong. 2d Sess. Senate Report No. 1358, Letter of John W. Davis, Esq.). The Committee on the Judiciary reported that both Senate bills were drafted to meet the "constitutional objection of John W. Davis." Thus, to answer the objection that the registration requirements raised a problem of self-incrimination under other provisions of Section 4, the committee attempted a remedy which it termed a "specific bar to self-incrimination written into Section 4(f)" (Senate Report 1358, *supra*, 20-21). At that stage of the legislation, however, Section 4(f) applied to no other criminal statute than the proposed statute of which it was a part (Senate Reports No. 1358, *supra*, 17, and 2369, *supra*, 17).

That the registration provisions raised self-incrimination difficulties also with respect to the Smith Act was brought to the attention of the Senate in the minority report on S. 4037 (Senate Report 2369, *supra*, 13) and in the debate (96 Cong. Rec. 14491, 14500). Similarly in the House in the debate on H.R. 9499, it was objected that the bill purported to protect against self-incrimination only under the provision of Section 4 of the bill and failed to provide such protection with respect to the Smith Act (96 Cong. Rec. 13739). Thereupon the author of the bill, who was also the chairman of the committee reporting it, offered an amendment which added the language "or for any alleged violation of any other criminal statute". The amendment was agreed to without further debate or explanation (96 Cong. Rec. 13761). The conference report carried this change, in substance, over into the bill as finally enacted (House Report No. 3112, *supra*, 7).

Simultaneously the framers of the legislation expressed marked solicitude to avoid guilt by association. In its report on S. 2311 the Committee on the Judiciary claimed that the bill satisfied the test laid down by this Court in *Knauer* v. *United States*, 328 U. S. 654, and quoted from the majority opinion the portions reaffirming the rule against proof by imputation and upholding the denaturalization of Knauer as based upon a "pattern of conduct" and "overt acts", rather than membership in an organization. In this respect the committee said that "Section 4 requires individually incriminating evidence of active participation in the activities prohibited" (Senate Report 1358, *supra*, 19, 20).

The same committee, in this connection, appended a memorandum of Donald R. Richberg, Esq. to its report. His language makes plain the purpose to avoid convictions of crime based upon membership alone or together with constitutionally protected conduct:

"It is true that a member of a political party or other loose organization should not be held responsible for personal violations of law by some officer or other member of the organization, in which he did not participate or which he did not help to conceal * * *"

"It will be seen that no individual is made guilty because of mere association with others. He must do something himself which is made unlawful * * *"

"Since such an organization (i.e., a 'Communist organization') is not outlawed it is evident that mere educational propaganda and campaigns for political reforms or to elect candidates to public offices are not made unlawful * * *" (Senate Report 1358, *supra*, 32, 33)

During the debate in the Senate, Senator O'Conor, a proponent and a member of the Committee on the Judiciary, stated that it was the purpose of the bill to make punishable "only overt acts" and to require "substantial evidence that the accused is engaged in an activity which is aimed at the overthrow of our form of government" (96 Cong. Rec. 14257).

It would therefore appear that the framers of the legislation intended not simply to forbid convictions under "any * * * criminal statute" based upon mere membership or officership in the Communist Party, but also to require that such convictions rest upon evidence of actual participation in the activities which the statute proscribes and no other.

The trial court recognized that Section 4(f) of the Internal Security Act imposed limitations of a substantial dimension on the application of the Smith Act. This recognition is reflected both in its rulings on the motion to dismiss and in the charge to the jury. See Reporter's Transcript, 9962, 9775-76 and appendix to brief, p. 146.

The trial court construed Section 4(f) in this manner: It recognized that mere naked or formal officership in the Communist Party was not sufficient to justify a finding by the jury of conspiratorial guilt (A. App. 146). Yet it permitted the jury to consider such officership or membership as a substantial element of such guilt. But under the decisions of this Court nothing less than complete immunity as to all matters, transactions or things which would be touched upon by the admissions made in the registration under the Internal Security Act would render the registration enforceable. See *Counselman* v. *Hitchcock*, 142 U. S. 547; *Brown* v. *Walker*, 161 U. S. 591. And the recent majority decision in *Communist Party* v. *Subversives Activities Control Board*, — App. D. C. — (1954), likewise argues that the constitutionality of the registration provisions are conditioned upon such complete immunity. The trial court's construction of Section 4(f) would thus attribute to it a meaning which would seem to be in conflict with the registration provisions. In addition, the trial court seems to have made a distinction for purposes of Section 4(f) between the fact of being an officer and the things which the individual would normally say or do in the course of carrying out his duties as an officer. But it is indeed a sterile immunity which protects the fact of office alone but permits incrimination on the basis of the duties of the office. Review is required, therefore, in order to clarify the boundaries between these two statutes, both seeking to police the same area. For, as matters now stand, Section 4(f) has been interpreted by the trial court so as to render its purpose nugatory.

The trial court, over objection, admitted the out-of-court declarations of third parties upon the theory that they were the declarations of co-conspirators. The link of these third parties to the petitioners was common membership or officership in the Communist Party. The trial court

rejected the contention that Section 4(f) forbids the use as evidence *aliunde* to qualify the declarations of co-conspirators in cases of this kind that the declarant is a member or officer of the Communist Party. It ruled that the evidence of the acts and declarations of individuals who were shown only to be Communist functionaries and nothing more were admissible against the accused. However, the rule which permits such acts and declarations to be admitted against the accused is not an independent testimonial principle but is simply ancillary to and derived from the substantive law of vicarious liability of co-conspirators. See, for example, 4 Wigmore *Evidence* (3rd Ed.), 130-131; *United States* v. *Pugliese*, 153 F. 2d 497, 500 (C. A. 2). In short, the admissibility of this evidence is predicated upon a *prima facie* finding by the judge that the declarant was linked in conspiratorial guilt to petitioners. This judgment, it seems to us, Section 4(f) prevented the trial court from making. And the legislative history as we have given it above bears us out for it indicates that Congress particularly intended in passing Section 4(f) to restrict the evidentiary use of membership or officership in a Communist organization. This, too, then presents an added reason why the clarifying aid of review is required. Moreover, the problem must be seen in a broader focus. As anti-Communist measures proliferate without sharp congressional focus on their boundaries and interrelationships, it becomes peculiarly important that the Court reconcile and place them in coherent context.

IV

A question is presented as to whether the petitioners may constitutionally be denied a hearing on the issue of clear and present danger. This is a question which was not argued in the petition for certiorari and is of a substantial nature.

The petitioners were denied a hearing on the issue of clear and present danger, although timely application was made for such a hearing (Doc. No. 275, Vol. VIII). Because this issue was not argued in our original petition and because it is enmeshed in a cluster of related issues, we propose to present it for the Court's consideration.

The *Dennis* case does not sanction the denial of a hearing on the issue of clear and present danger. This Court made it clear that to justify a conviction in a Smith Act case, three elements must be found: (1) the gravity of the evil which could result from the speech attacked; (2) the probability that a serious substantive evil would result if such speech were not attacked; and (3) the necessity of restricting the speech in order to make the occurrence of the evil less likely. The shift from the emphasis placed by *Schenck* v. *United States,* 249 U. S. 47, 52, on imminence, did not at all alter the objective character of the standard. Each of the three elements of the present test requires an exploration of the circumstances surrounding the speech before the speech can be restrained. And the Court of Appeals conceded in *Dennis* that "the degree of probability that the utterance will bring about the evil is a question of fact", 183 F. 2d at 215.

The framing of the constitutional issue in Smith Act cases does not merely make underlying constitutional facts relevant; it makes them vital to a conviction. As speech is protected or unprotected according to the company it keeps (or might keep), according to the social or political milieu in which it lives, its environment is an indispensable element in determining the amount of protection it deserves. Therefore, where speech is attacked as criminal, there must be shown before conviction, not only facts establishing the statutory offense, but also the existence of an environment capable of being dangerously influenced by the speech.

If objective circumstances are determinative, then defendants must be granted an opportunity to influence the trier's judgment as to the existence and meaning of those circumstances. In the *Dennis* case this Court recognized that the views of Justices HOLMES and BRANDEIS in the *Gitlow* and *Whitney* cases are now regarded as the law, 341 U. S. at 507. The majority opinion in *Gitlow* v. *New York*, 268 U. S. 652, adopted the view that the mere passage of the statute foreclosed attack on the constitutionality of its application to a particular set of utterances. The dissenting opinion in *Gitlow* insisted upon the right to test the validity of the application of a statute.

In *Whitney* v. *California*, 274 U. S. 357, 379, Justice BRANDEIS' concurrence expressly stated that the defendant could have made the existence of the requisite danger the important issue at her trial, but she had not done so. Justice BRANDEIS noted that "there was evidence on which the court or jury might have found that such danger existed". As the *Whitney* concurrence further pointed out (at 378-379):

> "As a statute, even if not void on its face, may be challenged because invalid as applied, Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, the result of such an enquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it remains open to a defendant to present the issue whether there actually did exist at the time a clear danger, whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature."

Despite the assurances to the contrary in the *Dennis* case, Justice BRANDEIS' concurrence is no longer the law if the trial court's denial of a hearing on the issue of clear and present danger is affirmed.

In *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153, the Supreme Court, referring to the *Whitney* concurrence, held that even a commercial regulation would deny due process if it "precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis". The Court in that case went on to say that while such a showing would have to overcome the presumption of constitutionality attaching to legislation, the scope of that presumption was narrower where the challenged statute affected the personal liberties of individuals.

We do not think that the right to a hearing depends upon whether courts be deemed to be acting as a "surrogate" for the legislature (183 F. 2d at 216) or in some other capacity. In the field of civil liberties, it is particularly true that the legislature cannot be its own judge of when it is appropriate to curtail freedom of speech. Moreover, whether there is a factual justification for creating an exception to the guarantees of the Constitution depends upon circumstances, and the answers to the question whether constitutional protection is appropriate must vary from time to time and place to place. Legislative findings could hardly settle such a question of fact once and for all.

Thus, if in 1940 the legislature had passed the Smith Act and made findings of the kind made by the trial court in support of the constitutionality of the statute's application, there can be no doubt that it would be open to a litigant today to put in issue:

1. The validity of the findings when made. See *Whitney* v. *California, supra,* and the *Carolene Products* case, *supra.*

2. The validity and applicability of the findings insofar as they relate to the speech or conduct of the defendant. See *Whitney* v. *California, supra.*

3. The extent to which the findings had lost applicability by reason of the change in the situation upon which they were predicated. *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543; *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 442; *Nashville C. & St. L. Ry.* v. *Walters,* 294 U. S. 405, 415.

If a legislature could not prevent a challenge to its findings,* how could a court, putting itself in the legislature's place, immunize such findings from challenge?

In short, under all the traditional rules governing the attack upon statutes and their applicability, the petitioners have a right to a hearing in order to present legislative and adjudicative facts.** Where a restriction upon the exercise of First Amendment rights is involved, we have always been assured that the right to a hearing is greater and not less than in the ordinary commercial case.

Surely the Court cannot be unmindful of the fact that as application is made of statutes in the political area, courts are progressively invited to surrender their judicial functions and to become partners of the legislature, to share the legislature's basically political objectives. But whatever deference the courts may be deemed to owe to the leg-

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* To the effect that legislative declarations of fact must be regarded critically in relation to the question of power lest by such means the legislature attempt to "lift itself by its bootstraps", see 49 Harv. L. R. 634. 4 Wigmore, *Evidence* (3d ed.) 708 points out that a recital of fact in a statute "is not conclusive testimony" and that such recitals are commonly intended merely as explanations of motives and purposes and "could not, without gross injustice, be made evidentially conclusive". He adds that to forbid investigation of the facts in such a case is to "forbid the exercise of an indestructible judicial function" (*ibid.*, at 716).

** On the right to a hearing on and review of facts in constitutional cases on the legislative and adjudicative levels, see Professor Paul Freund's discussions in *Supreme Court and Supreme Law,* edited by Edmond Cahn (1954) at page 47.

islative judgment, it is their final responsibility to give maximum protection to the personal liberties guaranteed by the Constitution. Indeed, how can a court be sure that its finding of clear and present danger has a rational basis, absent a hearing at which the parties have been afforded opportunity to adduce evidence on the issue? Nowhere has the absolutist dogma of legislative omnipotence brought more injury to the judicial process than in the notion that constitutional rights can be foreclosed without an opportunity for a hearing.

Nor can it be said that the device of a hearing is in some manner inappropriate to a presentation of constitutional facts. In a long series of decisions dealing with statutes regulating economic matters, this Court has insisted that an adequate foundation, based upon facts or expert testimony, must appear in the record before constitutional issues are decided. See *Smith* v. *Texas,* 233 U. S. 630, 633; *Bunting* v. *Oregon,* 243 U. S. 426, 438; *Chastleton* v. *Sinclair,* 264 U. S. 543, 549; *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402, 410; *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209; *Nashville C. & St. L. Ry.* v. *Walters,* 294 U. S. 405, 414-416; *Polk Co.* v. *Glover,* 305 U. S. 5, 9.

It cannot be said that petitioners suffered less injury as a result of the denial by the trial court of a hearing on this issue than would be suffered by any defendant in a criminal case denied an opportunity to adduce evidence concerning an essential element of his offense. In this case, a hearing could have corrected many of the trial court's highly inaccurate assumptions. In such a hearing, petitioners would have pointed out that the clear and present danger conclusions in *Dennis* could not be used—as they were—to deprive their utterances of constitutional protection because their roles could not be equated to those of the *Dennis* defendants, because the content of the conspiracy of which they were convicted was wholly different in that it lacked the element of organization, and because the

passage of time had de-vitalized many of this Court's conclusions with respect to the world situation.

Against the background of the evidence in the case, petitioners would have further adduced in such a hearing extrinsic evidence which would answer the following basic questions of fact:

1. What is the probability that the alleged advocacy of force and violence by these petitioners will bring about the overthrow or attempted overthrow of the United States Government?

2. What are the social costs, in terms of the effect upon the democratic liberties of the American people, of prohibiting advocacy of revolutionary change through a program of prosecutions under the Smith Act?

3. To what extent does the prosecution of these petitioners for alleged advocacy of force and violence minimize the possibility of overthrow of or attempted overthrow of the United States Government?

4. Are there effective alternative methods of eliminating the possibility of overthrow or attempted overthrow of the United States Government?*

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* Question 1 is relevant to a determination of the "gravity of the evil". It is also relevant in applying the phrase "discounted by its improbability". Questions 2, 3 and 4 seem to be plainly implied in the phrase "*justifies* such invasion of free speech as is *necessary* to avoid the danger". Were these elements to be omitted from consideration, then the constitutional test would be simply that, if the danger is great and probable, *any methods at all* can be constitutionally employed to meet it. This cannot be the law. Support for the relevancy of Question 4 is found in such cases as *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96; *Schneider* v. *State*, 308 U. S. 147 and *Martin* v. *Struthers*, 319 U. S. 141, which insist that the legislature must first exhaust alternative and non-abridging methods of curtailing the evil and averting the threatened danger. As Professor Paul H. Freund has pointed out in *On Understanding the Supreme Court* (1950) 27, the clear and present danger test must take into account "the availability of more moderate controls than those which the state has imposed".

Petitioners in such a hearing would have presented extrinsic evidence demonstrating that there are no objective conditions in the world situation from which a realistic inference could be drawn that petitioners' teachings threaten our security. It would have dealt in detail with the strength of our domestic institutions and shown that they command the loyalties of our people.* It would have developed factual data concerning the extent of our defenses against subversion. It would have pointed out that any genuine threats to our security could be easily met by a veritable arsenal of legislation.

Such a hearing would have contrasted the poor security return from the application of the Smith Act to petitioners with the profligate expenditure of First Amendment values which it entails. It would have demonstrated that while we proclaim in the chambers of international tribunals our dedication to freedom and fill the airwaves of the world with the boast that we are a free people, we are unfree as never before. Petitioners would have introduced oral and documentary testimony from experts who have studied our national life and are intimate with world opinion, to establish that our traditions of freedom have been compromised at home and our reputation undermined abroad by the growing repression in this country. Such testimony would have established that there is an atmosphere of deepening fear which has been generated in this country by applications of the Smith Act of the kind in-

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* The heart of any analysis of whether there is a nexus between speech and dangerous action is a determination that the utterances involved so interact with *domestic* political and economic conditions as to create a danger of a substantive evil. Certainly the facts with respect to such conditions supply the surest and most reliable index to whether or not the words spoken were "used in such circumstances and are of such a nature" as to create a clear and present danger, *Schenck* v. *United States*, 249 U. S. 47, 52. Yet, curiously enough, in this case the trial court wholly ignored this aspect of the clear and present danger test.

volved here. Such testimony would have developed the fact that prosecutions like this sterilize the exercise of free expression by non-Communists who fear that they may be tarred with the same brush; that such prosecutions cripple group action and create fear of joining any organization dedicated to economic or political change.

A hearing on this issue would further have developed the fact that such prosecutions imperil our liberties by creating a governmental apparatus for the punishment of political expression, by encouraging the accumulation of secret dossiers on political dissenters, by creating a corps of political spies and informers who are hired by the Government to betray its citizens.

Finally, such a hearing would have developed the fact that prosecutions such as these have historically, both here and abroad, been the mark of repressive and anti-democratic regimes, that they are exploited by demagogues so as to form a barrier to the rational solution of the momentous problems which confront our time.

Untouched by the controversy as to the permissible scope of constitutional freedoms is the recognition that it is the function of the courts to interpret restraints upon freedom with economy and fluidity so as to insure the maximum protection of protected freedoms and the relaxation of restrictions upon such freedoms at the earliest possible moment. As the *Dennis* case was interpreted below, this basic function is frustrated because petitioners were denied the opportunity to influence the trial court's judgment as to the justifying need for such restrictions. But in the final analysis, the function of the courts is to do justice under a system of due process of law. The denial of the right to litigate an essential element of the offense charged was in conflict with this primary responsibility of the judicial system.

V

A question is presented as to whether the trial court improperly resolved the issue of clear and present danger on the basis of judicial notice. This is a question which was not presented in the petition for certiorari and is of a substantial nature.

In denying petitioners' motion for a hearing on the question of clear and present danger, the trial court stated:

> "I consider that I have sufficiently before me in the record and in the material of which I am entitled to take judicial notice to make the determination of clear and present danger, but for your benefit I will be glad to advise you what the facts are of which I am taking a judicial notice." (Tr. 13672)

The Court then read a statement in which certain clamied propositions were recited as "facts" of which the Court took judicial notice. But judicial notice cannot serve as a "pretext for dispensing with a trial." For "notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believe it disputable.' " *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio.* 301 U. S. 292, 301-302.

As Wigmore points out (9 *Evidence,* 3d Ed., 535):

> "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. This is because the court assumes that the matter is so notorious that it will not be disputed. But the opponent is not prevented from disputing the matter by evidence, if he believes it disputable. It is true that

occasionally a court is found declaring a thing judicially noticed and at the same time refusing to listen to evidence to the contrary; but usually this is in truth laying down a new rule of substantive law by declaring certain facts immaterial; whenever a court forbids the production of evidence, it removes the subject from the realm of the law of evidence properly so called."

Moreover, the controversial matters of opinion which form the basis of the trial court's conclusions are not properly subject to judicial notice. And even if they were not excluded from permissible notice for that reason, they still could not be noticed, for the "external political facts of international affairs" are not a subject of judicial notice. *Ibid.*, 562.

At the very minimum, the appellants were entitled to an opportunity to participate in a proceeding to contest the indisputability of the facts of which the trial court took judicial notice. In an analysis of the very problem in focus here, namely, the manner in which the constitutional standard of the *Dennis* case is to be administered, it has been pointed out:

> "To assure that the facts of which it proposes to take notice are properly subject to notice, the court should give the defendant an opportunity to controvert these facts, although reserving to itself the final determination as to whether they are genuinely disputable. Disregard of the disputed facts may still leave an undisputed residue adequate to fill in the background of inherent probability. If not, there would remain no alternative but to take testimony on the issue." *

See also *Model Code of Evidence*, Rules 804-806.

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* Richardson, *Freedom of Expression and the Function of Courts*, 65 Harvard L. R. 30-31.

VI

A question is presented concerning as of what time must a clear and present danger be shown to exist in order to justify withholding constitutional protections from petitioners. This is a question which was not raised in the petition for certiorari and is of a substantial nature.

Let us assume that the trial court (a) properly found the existence of a clear and present danger, (b) properly denied petitioners a hearing, and (c) properly took judicial notice of the "facts" allegedly giving rise to a clear and present danger. There remains the question urgently calling for review here whether the supervention of new facts in the course of the reviewing process requires a re-evaluation of the issues in the light of those facts.

In the *Dennis* case, the Court will recall, Judge MEDINA found the existence of a clear and present danger, but in no way indicated the reasons or bases for his findings. Judge HAND made a clear and present danger finding *de novo*, apparently in discharge of an independent judicial responsibility, and adduced certain reasons drawn from the political state of the world in support of his finding. The matters to which Judge HAND referred were dated as of the summer of 1948 when the indictment was brought. In the same way, Chief Justice VINSON's plurality opinion referred to certain facts which, it was alleged, justified the constitutional application of the statute (341 U. S. 510-511) but did not refer or deal with the supervening changes in the political situation between the summer of 1948 when the indictment was brought and June 4, 1951 when this Court's opinion was handed down.

The petitioners in the *Dennis* case did not urge before this Court that there was no clear and present danger, as there defined, either at the time that the indictment was brought or when the case was presented to the Court.

In this case the indictment was brought in June, 1951. The decision of the trial court as to the existence of a clear and present danger adopted in large part the findings of Judge HAND. The decision of the lower court on October 14, 1954 merely approved the finding of the trial court without taking into account the tremendous change in political circumstances which had intervened between June, 1951 and the date of the decision. In approving this finding it pointed out that the factors which had contributed to Judge DIMOCK's decision as well as the procedures he followed "were the very ones considered by this Court in upholding the trial court's finding of 'clear and present danger' in 1948 in *Dennis*, brought down to date" (App. 1944).

But surely the fact that Judge DIMOCK largely adopted the findings considered by the court below and this Court in the *Dennis* case cannot exhaust a reviewing court's responsibilities. Assuming that the same factors which contributed to the existence of a clear and present danger in *Dennis* persisted when this case was brought to trial and that a re-adoption of them was warranted—which we strongly question and will develop at length in our petition for rehearing—the reviewing court was required itself to determine whether at the time the case was brought for review there were then in existence factors which justified the continuing denial of constitutional protections. Nothing seems to us to demonstrate this more clearly than the very next sentence in the lower court's opinion, which states that "If the danger was clear and present in 1948, it can hardly be thought to have been less in 1951 when the Korean conflict was raging and our relations to the Communist world had moved from cold to hot war." (App. 1945) The fact remains that at the time the opinion was written the Korean conflict had ended and our relations with the Communist world had decidedly im-

proved. Was the lower court not bound to take this into account in determining whether petitioners' constitutional rights had been invaded?

As we have already noted, the function of a court in a constitutional case is to find wherever possible reasons for protecting speech and not to permit the dead hand of the past to throttle it. As this Court has noted in the *Dennis* case, both in the plurality opinion of Chief Justice VINSON and in the concurring opinion of Associate Justice FRANKFURTER, a judgment of clear and present danger is basically a rough prophecy: If speech is unrestrained dangerous consequences to the national security may ensue. But is a court required to restrict the exercise of speech when the passage of time has robbed the prophecy of its validity?

The problem involved here must be distinguished from that presented by application of the law to a conventional crime where punishment serves the end of deterrence. The only justifiable end here is the preservation of some important national interest—not the punishment of individuals for speech which might create dangers already neutralized by time. Just as a court of equity must shape its decree in the light of the facts current at the time of its final action, so a reviewing court in determining the propriety of an invasion of free speech must shape its determination in the light of the political climate obtaining at the last possible moment when the issue is before it for determination. Surely this Court would not hesitate to strike down a statute valid at its enactment and initial challenge if a change in the facts upon which it was predicated supervened in the course of the reviewing process. Compare *Block* v. *Hirsch*, 256 U. S. 135; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543; *Nashville C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 415. We believe that in this case involving the denial of constitutional protection in the area of the

First Amendment it is necessary for this Court itself to consider whether as of January, 1955 the facts referred to by Judge DIMOCK—relying in part upon conditions allegedly existing in 1948—still have vitality to deprive petitioners of constitutional protections. Unless this Court recognizes the necessity for weighing petitioners' right to speech against current political realities rather than ghostly phantasms, there is a serious danger that petitioners—and all other Communists tried under the Smith Act—will be convicted not because of the destructive impact of their speech upon some presently existing national interest, but because they are Communists. If fears for our security are to result in a narrowing of our liberties, then those fears should be predicated upon the present and not frozen into our constitutional system by perpetuating a crisis which time has softened.

VII

A question is presented as to whether the evidence upon which the Government's case rests was procured through a violation of the First, Fourth and Fifth Amendments of the Constitution, *Gouled* v. *United States,* 255 U. S. 298. The evidence consisted of (a) testimony obtained through the use of government agents whose presence in Communist Party meetings can only be described as fraudulent and hence constituted a trespass, and (b) of testimony of ex-Communists who have become professional testifiers.

This contention was not involved in the *Dennis* case. It should be disposed of now. The integrity of the administration of justice requires it. The government violated the rights of freedom of assembly and association of petitioners when its informers, fraudulently and by stealth, obtained admission to their private meetings. The violation would have been clear to all had uniformed police forced their way into the meetings. *Local 309* v. *Gates,* 75 F. Supp.

620, 624 (D. C. Ind.). Is it any the less clear because admission was obtained by police agents posing as members of the Party? Can the F.B.I. avoid the consequences of the law which protects free association by using fraud as a substitute for force?

If evidence obtained in violation of a federal statute may not be received in a federal court,* it would seem self-evident that "a conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand," *McNabb* v. *United States,* 318 U. S. 332, 339. See also *Weeks* v. *United States,* 232 U. S. 383; *Boyd* v. *United States,* 116 U. S. 616; *Byars* v. *United States,* 273 U. S. 28.

Finally, petitioners fruitlessly requested the trial court that the jury be instructed that the testimony of the informers be scrutinized with great care. Compare *Fletcher* v. *United States,* 158 F. 2d 321 (App. D. C.). If informers are to become the standard witness in political trials, then this Court must determine authoritatively whether the administration of justice requires that their testimony be evaluated with special care.

The extent to which the use of the paid informers has compromised the administration of justice may be measured

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* This Court has on innumerable occasions held that evidence illegally secured is not admissible in the federal courts. This rule has been applied in a variety of cases. Thus, testimony secured through the violation of Section 605 of the Communications Act of 1934 (47 U. S. C. 605) is inadmissible. *Nardone* v. *United States,* 302 U. S. 379. A confession obtained in violation of the Prompt Production Statute (18 U. S. C. 595) is equally inadmissible. *McNabb* v. *United States,* 318 U. S. 332, rehearing denied 319 U. S. 784. Not only is evidence illegally obtained inadmissible, but evidence obtained through the use of clues supplied by illegally procured evidence is likewise inadmissible. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. In the words of the Supreme Court, a "fruit of the poisonous tree cannot be used to secure a conviction." *Nardone* v. *United States,* 308 U. S. 338, 341.

by the admissions, made since the filing of the petition for certiorari herein, by Harvey M. Matusow. This individual, one of the key witnesses in this case, has recently admitted in a sworn affidavit that he gave false testimony at the suggestion of the prosecution and with the knowledge of the prosecution that said testimony was false. We attach to this petition as Supplement II, a motion dealing with this matter filed with the trial court on January 31, 1955. As is obvious, this is the first time this matter could have been called to the attention of the Court.

Matusow's admitted perjury is but one manifestation of a deep seated threat to the administration of justice which urgently calls for the correction of this Court.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

HARRY SACHER,
Attorney for Petitioners.

Of Counsel:
HARRY SACHER,
MARY M. KAUFMAN,
DONNER, KINOY & PERLIN,
By FRANK DONNER,
ARTHUR KINOY,
MARSHALL PERLIN.

Certificate of Counsel

I certify that the within and foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to substantial grounds available to petitioners although not previously presented.

HARRY SACHER,
Of Counsel for Petitioners.

[SUPPLEMENTS I AND II FOLLOW]

SUPPLEMENT I

The Role and Organizing Activities of the Defendants in the Dennis Case

A. Statements by the Supreme Court

341 U. S. at 498

"But the Court of Appeals held that the record supports the following broad conclusions: By virtue of their control over the political apparatus of the Communist Political Association, petitioners were able to transform that organization into the Communist Party * * * "

341 U. S. at 509

"If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required."

341 U. S. at 510, 511

"The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score."

B. Statements by the Court of Appeals

183 F. 2d at 212, 230

"The American Communist Party, of which the defendants are the controlling spirits, is a highly articu-

lated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. * * *

"All the defendants had at one time or another been members of the National Committee, which is the executive organ of the Party elected by the National Convention; all had also been members of the National Board, a smaller body in which authority was vested between meetings of the Committee."

C. Excerpts from the Government's Court of Appeals Brief in the Dennis case Emphasizing the Controlling Role of the Dennis Defendants as a Group and Their Organizing Activities

Page 15

"Under the leadership of appellants, the Communist Party was recreated in the tradition of Lenin and Stalin."

Page 18

"The Board convened a meeting of the National Committee, called for discussion of the Resolution condemning Browder's class peace and directed that—

> During the entire period of the discussion, the policy and practical mass work of the Association shall be governed by the Resolution of the National Board."

Page 20

"The National Committee called a special convention to convene July 26, 1945, and it established a Secretariat comprised of Foster and appellants Dennis and Williamson empowered with full authority to act as the authoritative spokesman for the Association and to act for it.

"The National Committee also created a committee, including appellants Dennis, Thompson and Williamson, to make a 'political examination' of the leading officials of the Association and to propose recommendations for 'refreshing' the national leadership."

Page 28

"Between sessions of the National Committee, the National Board is charged with the responsibility of carrying out the decisions and work of the National Committee and is the leading authority of the Party (9 R. 6746). The National Board is elected by the National Committee and is responsible for all its actions to the National Committee (Ex. 26, p. 18, Art. 7, Sec. 7, 19 R. 14802; 5 R. 3674)."

Page 29

"The policy decisions of the National Committee and of the National Board, which acts as the executive arm of the National Committee (5 R. 3565), are transmitted to the various local organs of the Party and must be carried out regardless of whether the local officials agree with them (10 R. 7689; 11 R. 8321)."

Page 89

"The close relationship between the National Education Commission and the National Board and National Committee is undisputed. The Commission was established by the National Committee and appellant Stachel, a member of the National Board and National Committee, was its director for two years immediately preceding the return of the indictment. The Education Director is required to report periodically to the National Board and the National Committee on the work of the National Education Department (5 R. 3873; 9 R. 6886; 10 R. 8131), and the main policy of what is taught in Party schools is fixed by the National Board (11 R. 8441; 15 R. 11913)."

Page 123

"Appellants are the central figures who controlled the Party in the United States during the period covered by the indictment. During the entire period, they were members of its National Committee, and all served on the National Board, some for the entire three-year period and others for lesser periods in excess of one year.[95]

"Indisputably, they were the top policy making and administrative officials of the Party. By virtue of the Leninist principle of democratic centralism, they maintained an iron discipline over all members and officials of the Party, which insured the execution of their every command and which foreclosed Party activities inconsistent with the line which they laid out. As appellant Green testified * * * when the National Board decides on a policy, the subordinate organs of the Party execute that policy regardless of whether they agree with it. And the testimony of appellants Davis and Winston * * * emphasizes that this is as true with respect to the Party schools, as it is in all other aspects of Party activity."

Page 240

"These appellants are the organizers and leaders of the Communist Party and they, above all other persons in the United States, threaten serious injury to the national interests protected by the Smith Act."

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95. Assuming, *arguendo*, that some of the appellants became members of the conspiracy only when they joined the National Board, that would not aid them. For they adopted and furthered the conspiracy and may properly be treated as co-conspirators. (Footnote in original.)

SUPPLEMENT II

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
C 136-7

UNITED STATES OF AMERICA

v.

ELIZABETH GURLEY FLYNN, PETTIS PERRY, CLAUDIA JONES, ALEXANDER BITTELMAN, ALEXANDER TRACHTENBERG, VICTOR JEREMY JEROME, ALBERT FRANCIS LANNON, LOUIS WEINSTOCK. ARNOLD SAMUEL JOHNSON, BETTY GANNETT, JACOB MINDEL, WILLIAM WOLF WEINSTONE and GEORGE BLAKE CHARNEY,

Defendants.

Upon the annexed affidavits of Harvey M. Matusow and Mary M. Kaufman and upon the transcript of the evidence and exhibits and upon all of the proceedings in the above entitled action, let the United States Attorney for the Southern District of New York show cause before me or one of the Judges of this Court, sitting at a Term thereof, to be held at the United States Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, in Room 318 thereof, on the 2nd day of February, 1955, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, should not be granted on the ground that a new trial to the defendants is required in the interest of justice and on the ground of the newly discovered evidence set forth in the annexed affidavit of Harvey M. Matusow.

Sufficient reason appearing therefor, let service of a copy of this order to show cause and the annexed motion and affidavits, upon the United States Attorney for the Southern District of New York, on the 1st day of February, 1955, be deemed good and sufficient service.

Date: New York, New York
January 31, 1955.

/s/ E. J. DIMOCK,
U. S. D. J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 136-7

UNITED STATES OF AMERICA

v.

ELIZABETH GURLEY FLYNN, PETTIS PERRY, CLAUDIA JONES, ALEXANDER BITTELMAN, ALEXANDER TRACHTENBERG, VICTOR JEREMY JEROME, ALBERT FRANCIS LANNON, LOUIS WEINSTOCK. ARNOLD SAMUEL JOHNSON, BETTY GANNETT, JACOB MINDEL, WILLIAM WOLF WEINSTONE and GEORGE BLAKE CHARNEY,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARY M. KAUFMAN, being duly sworn, deposes and says:

1. She is the attorney for the defendants in the above entitled proceeding and is fully familiar with all the facts in connection therewith.

2. This affidavit is submitted in support of a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the ground that a new trial to the defendants is required in the interest of justice and on the ground of newly discovered evidence set forth in the annexed affidavit of Harvey M. Matusow.

3. The defendants were indicted on June 20, 1951. The indictment charges in a single count a conspiracy under

Section 3 of the Alien Registration Act of 1940, commonly known as the Smith Act (54 Stat. 671; 18 U.S.C. (1946 ed.) Sec. 11; 18 U.S.C. (1948 ed.) Sec. 371) to engage in conduct prohibited by Section 2 of the Act (18 U.S.C. (1946 ed.) Sec. 10; 18 U.S.C. (1948 ed.) Sec. 2385), to wit: "(1) Unlawfully, wilfully, and knowingly, to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; and (2) unlawfully, wilfully, and knowingly, to organize and help to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence."

4. The trial commenced on March 31, 1952, and the issues were tried on the merits before Hon. EDWARD J. DIMOCK from April 24, 1952, through January 21, 1953. On September 22, 1952, after the Government had rested, the defendants moved for a judgment of acquittal. On September 23, 1952, said motion was granted in respect to defendants Simon William Gerson and Isadore Begun, both of whom were indicted and tried with the above named defendants, and denied in respect to all of the other defendants on trial. On January 21, 1953, each of the remaining defendants was found guilty. All of the defendants were sentenced on February 3, 1953, and judgments were filed and commitments issued on the same day.

5. The defendants duly appealed from the judgment of conviction herein to the United States Court of Appeals for the Second Circuit and that Court rendered a judgment on October 14, 1954, affirming the judgment of conviction. Thereafter the defendants duly filed a petition in the Supreme Court of the United States for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the judgment of the Court of Appeals.

The Supreme Court denied said petition on January 10, 1955. The order of the Supreme Court denying said petition for certiorari was received by the Clerk of the United States Court of Appeals for the Second Circuit on January 18, 1955.

6. In the annexed affidavit of Harvey M. Matusow, a witness for the Government in the above entitled proceeding, Mr. Matusow states that testimony he gave in the course of the trial against the defendants herein was either false or not entirely true and was known to be either false or not entirely true. In said affidavit Mr. Matusow sets forth with specificness matters concerning which he falsely testified with knowledge that said testimony was false. He further states in said affidavit that certain of the testimony was falsely given at the suggestion of the prosecution and with the knowledge of the prosecution that said testimony was false.

7. The false testimony aforesaid was material to ultimate issues posed by the indictment and was of such an inflammatory and outstanding quality as to justify the conclusion that without said testimony or with knowledge that said testimony was false, the jury would probably have acquitted.

8. The evidence contained in the affidavit was of course not available to the defendants herein at the time of their trial but has been newly discovered since then. It was not until a time subsequent to January 1, 1955, that the defendants herein learned that Mr. Matusow was willing to make an affidavit admitting the falsity of his testimony in the respects set forth in the affidavit hereto annexed. Defendants and their counsel have been diligent in obtaining the said evidence and this motion is filed with the

objective of carrying forward the due and proper administration of justice in this Court and to have justice under the law done to each and every defendant herein.

9. The defendants request the Court to hold a hearing on the within motion and to permit the presentation of evidence and argument thereon.

10. The defendants offer to call Mr. Matusow as a witness and offer to prove that if he were permitted to testify he would testify to the effect of the matters set forth in the annexed affidavit of Mr. Matusow.

11. An order to show cause is being applied for to bring this motion on for a hearing because the time within which said motion may be made, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, may expire on February 3, 1955; hence sufficient time does not exist for the service of regular notice of motion.

12. No previous application has been made for the relief sought herein.

WHEREFORE, deponent respectfully prays for an order to show cause why a new trial of the defendants herein should not be granted, and for such other and further relief as to the Court may seem just and proper in the premises.

/s/ MARY M. KAUFMAN
Mary M. Kaufman

Sworn to before me this
31st day of January, 1955.
ROBERT Z. LEWIS
Notary Public, State of New York
No. 31-7537400
Qualified in New York County
Commission Expires March 30, 1956

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 136-7

UNITED STATES OF AMERICA,

v.

ELIZABETH GURLEY FLYNN, *et al.*,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

HARVEY M. MATUSOW, being duly sworn, deposes and says:

1. I make this affidavit in support of the motion by the defendants for a new trial and to do what I can to remedy the harm I have done to the defendants in the case of *United States of America* v. *Elizabeth Gurley Flynn, et al.*

2. I appeared as a witness for the Government against the defendants in the course of the trial in the above-entitled case in this Court in July, 1952, on an indictment charging the defendants with conspiring to violate the teaching and advocacy and organizing sections of the Smith Act.

3. The testimony I gave in the course of the trial appears in the typewritten transcript of the record at page 6565 and thereafter.

4. The matters I testified to were either false or not entirely true and were known to me to be either false or not entirely true, at the time I so testified, in that:

A. On July 22, 1952, I testified that defendant Perry addressed a meeting held in a restaurant on University Place in the City of New York in December, 1948. I further testified that:

> "Mr. Perry spoke about the question of building socialism. He said that the building of socialism went hand-in-hand with the setting up and establishing of a Negro nation in the black belt of the United States, and the freeing of the Negro people and the Negro liberation movement, that the South in the United States—there were some States such as Mississippi where the Negro people constituted a majority, and that a Negro nation would have to be set up, would be set up in the black belt. He referred to the book, Marxism and the National Question, and the basic principles for definition of what is a nation, and he stated that the Negro people in the United States constitute a nation, and that this nation could not be set up unless socialism were to come to power in the United States and that the bourgeoisie would not sit back and let it come to power peacefully, and therefore the working class led by the Communist Party would have to forcibly overthrow this bourgeoisie to set up the Negro nation while establishing socialism." (Tr. 6628-29)

The foregoing testimony was true only in so far as it states the fact that Defendant Perry addressed the meeting I described on the date indicated, but I gave false testimony when I testified that defendant Perry said that the building of socialism went hand in hand with the establishment of a Negro nation in the Black Belt of the United

States and that this nation could not be set up unless socialism were to come to power in the United States, that the bourgeoisie would not sit back and let it come to power peacefully and therefore the working class, led by the Communist Party, would have to forcefully overthrow the bourgeoisie in order to set up the Negro nation while establishing socialism.

At no time did I, either at this meeting or elsewhere, hear defendant Perry make the foregoing statement or refer to the overthrow of the United States Government by force and violence or by any other means.

B. I further testified on July 22, 1952, that in the fall of 1949 defendant Trachtenberg had a conversation with me at the Workers' Book Shop, where I was employed, concerning a book entitled "Law of the Soviet State", by Andre Vishinski (Tr. 6645-6646). I further testified that defendant Trachtenberg said that

> "• • • the concepts created here by Mr. Vishinski on a new form of socialist law were diametrically opposed to the English law, and that the Party should be familiar with this new concept of Socialist law, and that if the book were published at a lower price than $15, it would be very useful in the Party apparatus and educational set-up." (Tr. 6646)

I also testified that

> "Mr. Trachtenberg said that the book contained the first comprehensive report of the Soviet concept of law and the Marxist Leninist concept of law.
>
> "He went on further to say that in talking about the book, the law of the Soviet State, that the question of capitalism and socialism here, or the creating of a socialist society and eliminating class antagonisms, how that was to be accomplished through the establishment of socialism, how the diametrically opposed classes could be eliminated—were found in that book." (Tr. 6653)

My testimony regarding defendant Trachtenberg's remarks about the book, "Law of the Soviet State", was true in respect to the fact that defendant Trachtenberg casually mentioned the book as one of many which were being sold in the Jefferson School Book Shop. The extent of his remarks was solely that of inquiry in relation to the sales of the book in the same general conversation in which the sales of other books in the Book Shop was discussed.

In all other respects, my testimony concerning this conversation with defendant Trachtenberg is false. At no time in the course of the conversation did defendant Trachtenberg make the statements that I attributed to him in the foregoing quoted portions of the testimony. At no time did defendant Trachtenberg refer to the book in relation to the concept of revolution or overthrow of the Government. At no time during the many occasions that I met with and talked with defendant Trachtenberg did he indicate that he advocated the overthrow of the United States Government by force or violence or any other means.

The question of my testimony concerning the book "The Law of the Soviet State", by Andrei Vishinsky, was first raised by Roy Cohn, Assistant United States Attorney, who worked with me in preparing my testimony. The conversation in which the subject was first discussed with Cohn took place in a car driven by a Special Agent of the F.B.I. United States Attorneys David Marks, Roy Cohn and J. J. McCarthy, a Special Agent of the F.B.I., and two other individuals were seated in the car at the time. Mr. Cohn mentioned the book by Vishinsky. Cohn said that because of a section of the book it would be important to connect the book with the defendants. He said that the United States Attorney had attempted to introduce this book in the Dennis case, but was unable to lay the necessary foundation. He then asked me if I had ever discussed the

book with any of the defendants. I told him that I had discussed it with Trachtenberg. Cohn asked me for the substance of that conversation, and I informed him that Trachtenberg had inquired about the sales of the book in a conversation in which he made similar inquiry concerning the sales of other books carried in the book shop.

A subsequent conversation concerning the book occurred in Roy Cohn's office. He showed me the book entitled "The Law of the Soviet State", and asked me whether this was the book which Trachtenberg had discussed with me. He then asked me for further details concerning this conversation with Trachtenberg, and I informed him that Trachtenberg had discussed the price of the book. Cohn stated that this would not be sufficient to lay the necessary foundation for its introduction in evidence. Cohn pointed to a passage in the book and told me that that passage was important in proving the Government's case. He then asked me if I had discussed anything with Trachtenberg which would tie him with this passage, and I said, "No", I had not. Nevertheless, thereafter, in several sessions with Cohn, we developed the answer which I gave in my testimony, tying Trachtenberg to that passage. We both knew that Trachtenberg had never made the statements which I attributed to him in my testimony.

C. I testified that in December, 1948, I attended a meeting at the Hank Forbes Auditorium of the Communist Party Headquarters at 35 East 12th Street, New York City, at which Arnold Johnson spoke (Tr. 6626-27), and I testified that defendant Johnson said:

> "• • • that it was important for the Communist Youth Movement to build a new Marxist-Leninist Youth Group that would or could leave the white collar jobs and get out into basic industry in the tradition of the Young Communist League. He said that the New York organization, the Youth Organization of the Commu-

nist Party needed building. We had a trained cadre, and we had to train them in New York and get them out into the basic industries so that we could recruit young workers and get them on the side of the Communist Party. We had to get them into the trade unions in the midwest, in basic industries, and we had to recruit in there, and in the event of any war with the Soviet Union we would then have people on our side." (Tr. 6627)

It is true that defendant Johnson addressed the meeting at the time and place of the above testimony. But my testimony concerning the statements I attributed to him to the effect that it was necessary to get them into the trade unions in the midwest in basic industries, and in the event of any war with the Soviet Union we would then have people on our side, is entirely false.

D. I testified that about April 15, 1949, I had a conversation with defendant George Blake Charney at his office at 35 East 12th Street, New York City, concerning my trip to Puerto Rico (Tr. 6636). I testified that in the course of this conversation he said that:

"• • • that I should familiarize myself with the Party, the Communist Party line on Puerto Rico. He pointed out—Mr. Blake said that the struggle for the independence of Puerto Rico was tied up directly with the struggle for socialism. He said the Puerto Rico was being used as a military base by the United States, and an independent Puerto Rico would help to destroy those bases and cripple the Caribbean defense. He pointed out that the only time Puerto Rico would get its independence was when we had conducted an effective struggle for socialism and had overthrown the bourgeoisie there. He said he had been to Puerto Rico before and that if Puerto Rico were independent the struggle for socialism there would be accomplished a lot easier." (Tr. 6637-38)

My testimony relating to conversations with defendant Charney is true only so far as I did have conversations with him relating to Puerto Rico and my trip to Puerto Rico. But my testimony that he said that "Puerto Rico was being used as a military base by the United States and an independent Puerto Rico would help to destroy those bases and cripple the Caribbean defense;" and that "He pointed out that the only time Puerto Rico would get its independence was when we had conducted an effective struggle for socialism and had overthrown the bourgeoisie there" is entirely false.

At no time during the many conversations and meetings I had with George Blake Charney and other meetings at which he was present, did he state that he advocated the overthrow of the United States Government by force, violence or any other means.

E. On July 21, 1952, I testified concerning a course which I attended in the Fall of 1948 in the Institute of Marxist Studies at the Jefferson School in the City of New York (Tr. 6608-9). I further testified that at one course taught by Beatrice Siskind (Tr. 6609) she said:

> "• • • that American exceptionalism was a theory started in the 1920s when the Communist Party was under the leadership of Lovestone. She stated that American exceptionalism said that the United States would not suffer economic crises in the event of world economic crisis, that we were exempt or we just couldn't have one here if labor worked with the bourgeoisie or the capitalists or the management, as the case may be. She pointed out and said that American exceptionalism was also carried forth under Earl Browder in 1945 and said that was the reason for his expulsion, and that you could not, she said, collaborate with the bourgeoisie or the capitalists, that labor could

not. The only way to avoid economic crises is with the establishment of socialism, and she stated that socialism could not be obtained under a peaceful means, it could not be obtained by collaboration, that the capitalists or bourgeoisie would not give up without a struggle, and therefore the working class, under the leadership of the Communist Party, would have to take over by power and overthrow the bourgeoisie." (Tr. 6610)

The foregoing testimony concerning what Beatrice Siskind said is entirely false. I had no recollection at the time I testified nor do I now have any recollection as to what if anything was taught to me concerning the subject discussed in the foregoing testimony. The testimony was entirely fabricated to create the false impression with the Court and the members of the jury that the Communist Party taught and advocated the overthrow of the United States Government by force and violence. Prior to the time when I took the witness stand I could not have discussed or testified to the answer which was given on the stand. I had informed United States Attorney Roy Cohn that I was unable to recall what, if anything, Beatrice Siskind had said in the course. During several sessions I had with Cohn, he helped me formulate the answer which I memorized and gave in my testimony. This testimony was not based on what was actually said by Beatrice Siskind, but was created for the purposes of the trial.

F. I testified that in December, 1948, I attended a meeting of the Communist Party in Philadelphia at which Henry Winston, Organizational Secretary of the Communist Party, spoke (Tr. 6622-24). I further testified that I returned from Philadelphia together with Henry Winston and that on this return trip Winston said:

"* * * that his article in the fourteenth convention issue of Political Affairs, which was September of 1948,

should be read and studied more fully by the members of the Communist Party. He said that it was important for the young members of the Communist Party in New York, members of the Yough (sic) clubs, to get out of New York and to get out into the midwest into basic industries, out in Ohio, Illinois, Indiana, Western Pennsylvania, and up-state New York near Buffalo. He said that it was important to go there so that the young Communists could form a nucleus of workers on the side of the Communist Party, to recruit and get young people into the Communist Party, so that in the event of any imperialistic war, as he put it, we could help the side of the Soviet Union, as he stated it, and slow down production, and in some places call strikes, and in general see that the war production, in the event of a war, would not carry forward to its fullest capacity." (Tr. 6625-6)

My testimony relating to my conversation with Henry Winston in December, 1948, was true only so far as I did have a conversation with Henry Winston, but my testimony that Henry Winston said "* * * so that in the event of any imperialistic war, as he put it, we could help the side of the Soviet Union, as he stated it, and slow down production, and in some places call strikes, and in general see that the war production, in the event of a war, would not carry forward to its fullest capacity" (Tr. 6626) was false.

G. The foregoing does not exhaust the matters concerning which I testified falsely at the trial of these defendants. Nor do the incidents related in paragraphs 4B and 4C exhaust the matters concerning which I testified falsely with the knowledge of the United States Attorneys. For, on other occasions in connection with other portions of my testimony, the United States Attorneys participated in formulating statements which I attributed to the defendants and other persons named in my testimony which was

not based on what was actually said, but which was created for the purposes of the trial.

The reason I have not described in this affidavit other testimony which I gave which was false and other testimony which the United States Attorneys knew to be false is that there has been insufficient time since I first spoke to any defense counsel concerning this motion and the making of this affidavit to read the entire record of my testimony and to locate all of the matters concerning which I testified to falsely and/or which was known to be false by the United States Attorneys.

5. I make and swear to this affidavit voluntarily and of my own free will, without having been threatened, coerced, influenced, or intimidated in any way; without having been given any payment, reward, or any thing of value, or any promise thereof; and only for the purposes of now telling the truth, the whole truth, and nothing but the truth, and as I have said, to do what I can to remedy the harm I have done to these defendants and to the administration of justice.

6. I am willing to appear and testify to the truth of the above matters at any time.

/s/ Harvey M. Matusow
Harvey M. Matusow

Sworn to before me this
31st day of January, 1955.
/s/ Robert Z. Lewis
Robert Z. Lewis
Notary Public, State of New York
No. 31-7537400
Qualified in New York County
Commission Expires March 30, 1956